

No. 2215

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IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

ALVINA S. MERRITHEW,

Appellee.

Upon Appeal from the United States District
Court for the District of Oregon

TRANSCRIPT OF RECORD.

FILED

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Appellee.

**Names and Addresses of Attorneys
Upon This Appeal:**

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INDEX

	Page
Appeal—Petition for	37
Assignment of Error	39
Appeal—Bond on	43
Appeal—Order Allowing	42
Appeal—Citation on	45
Amended Bill of Complaint	1
Bill of Complaint—Demurrer to Amended	34
Bond on Appeal	43
Complaint—Amended Bill of	1
Citation on Appeal	45
Clerk's Certificate	48
Demurrer to Amended Bill of Complaint	34
Decree	36
Exhibit "A"	20
Error—Assignment of	39
Order Allowing Appeal	42
Order Enlarging Time to File Record	47
Petition for Appeal	37
Time to File Record—Order Enlarging.....	47

*In the District Court of the United States for the
District of Oregon.*

Be it Remembered, That on the 4 day of May, 1912,
there was duly filed in the District Court of the
United States for the District of Oregon, an
Amended Bill of Complaint, in words and figures
as follows, to wit:

[Amended Bill of Complaint.]

*In the District Court of the United States for the
District of Oregon.*

A. D. DANIELS,

Plaintiff,

vs.

ALVINA S. MERRITHEW,

Defendant.

TO THE HONORABLE JUDGES OF THE DIS-
TRICT COURT OF THE UNITED STATES IN
AND FOR THE DISTRICT OF OREGON:

A. D. Daniels, a citizen and inhabitant of the state
of Wisconsin, residing at Rhinelander in said state,
with leave of court first had and obtained, brings this,
his amended bill of complaint, against Alvina S. Mer-
rithew, a resident and inhabitant of the State of Ore-
gon, residing at Gresham, in said state.

And thereupon your orator complains and says:

I.

That at all times herein mentioned plaintiff was and
is a resident and inhabitant of the State of Wisconsin,
residing at Rhinelander in said state.

II.

And thereupon your orator further shows unto your Honors:

That at all times herein mentioned defendant, Alvina S. Merrithew, was, and is, a resident and inhabitant of the State of Oregon, residing at Gresham in said state.

III.

And thereupon your orator further shows unto your Honors:

That on the 12th day of April, 1902, an dimmediate-ly prior thereto, one Aztec Land and Cattle Company, Ltd., a corporation, was the owner in fee simple, free of any lien or incumbrances, of that certain property located in the Territory of Arizona, and particularly described as follows, to wit:

All of section twenty-five, twenty-seven, and twenty-nine, township sixteen north, range ten east, and the southeast quarter of section three, township nineteen north, range nine east G. & S. R. M., Arizona, and was the owner in fee simple of said property described in paragraph III of this amended complaint, up until the 2nd day of February, 1904.

IV.

And thereupon your orator further shows unto your Honors:

That on or about the 12th day of April, 1902, the said described lands, mentioned in paragraph III of this amended bill of complaint, were included within the limits of the San Francisco Mountains Forest Re-

serves, pursuant to a proclamation of the President of the United States made on or about the 12th day of April, 1902, which said lands were then, and still are, non-mineral lands.

V.

And thereupon your orator further shows unto your Honors:

That on or about the 8th day of February, 1904, that certain property situated within the District of Oregon, located in the County of Klamath in the State of Oregon, and particularly described as follows, to wit:

The southeast quarter of the northeast quarter; the north half of the southeast quarter; the southeast quarter of the southeast quarter of section eleven, township thirty-seven south, range ten east of the Willamette Meridian,

was surveyed, unappropriated, and vacant public land of the United States, returned and characterized upon the official records of the United States as non-mineral land, free and open to entry and settlement under and in accordance with the laws of the United States governing the acquisition of public lands.

VI.

And thereupon your orator further shows unto your Honors:

That on or about the 4th day of June, 1897, the Congress of the United States passed an act entitled: "An act making appropriation for sundry civil expens-

es of the government, for the fiscal year ending June 30, 1898, and for other purposes:" which act provides, among other things, as follows, to wit:

"That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the tract selected: Provided, further, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claim."

VII.

And thereupon your orator further shows unto your Honors:

That, on the 2nd day of February, 1904, the said Aztec Land and Cattle Company, Ltd., a corporation, did, in accordance with the provisions and requirements of the act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, relinquish and convey unto the United States of America those certain tracts of land hereinbefore described in

paragraph III of this amended complaint, and recorded the deed of conveyance in the office of the recorder of the county in which the lands are situated, and subsequently, and on or about the 8th day of February, 1904, filed with the Register and Receiver of the United States land office at Lakeview, Oregon, the said deed so recorded, together with a full, true, and correct abstract of title of the lands so relinquished, duly certified as such by the county recorder of the county in which the lands are situated, which abstract of title showed it to be the owner in fee simple of said lands, free and clear of any lien or incumbrances, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time selected in lieu of said lands so relinquished,

The southeast quarter of the northeast quarter; the north half of the southeast quarter; the southeast quarter of the southeast quarter of section eleven, township thirty-seven south, range ten east of the Willamette Meridian,

together with other lands, which selection so made was prior in time to the selection or entry of any other person or persons whomsoever, and, by virtue of said selection, there was initiated a right and interest prior in time and superior in right as against all persons whomsoever.

VIII.

And thereupon your orator further shows unto your Honors:

That regardless of said selection so made as alleged in paragraph VII of this amended complaint, the defendant did, on the 13 day of June, 1904, attempt to make a timber and stone entry upon the land described in paragraph V of this amended complaint.

IX.

And thereupon your orator further shows unto your Honors:

That on or about the 28th day of June, 1902, the state of Oregon filed upon the said tracts so selected, together with certain other lands, certain instruments purporting to be school indemnity lists, which lists were numbered lists 178 and 188, respectively, which said lists were duly and regularly accepted and filed by the Register and Receiver of the United States land office at Lakeview, Oregon, and thereupon were regularly transmitted to the Commissioner of the General Land Office of the United States government at Washington, D. C., to await the acceptance and approval of the land department of the United States government, but that, owing to the invalid character of the base lands tendered in said lists, the said lists were held for cancellation, and were subsequently cancelled upon relinquishments of said lists filed on behalf of the state of Oregon, on the 8th day of February, 1904.

X.

And thereupon your orator further shows unto your Honors:

That prior to the said cancellation of said school indemnity lists 178 and 188, and before any action what-

soever had been taken by the proper officers of the land department of the United States, except said Register and said Receiver, relative to the acceptance and rejection of the said indemnity lists, the State of Oregon, acting through the officers of the Oregon state land board, sold to various bona fide purchasers, for value, the timber lands upon which the said school indemnity lists 178 and 188 had been filed, and the said state had not at the time of such sale, nor has it at any time since ever acquired or owned any right, title, or interest in or to the said lands upon which the said lists were filed, including those lands more particularly described in paragraph V of this amended bill of complaint, which said lands described in said paragraph V were, for a valuable consideration, and in good faith, and without any knowledge whatsoever of the irregularity of the proceedings which had taken place in connection with the sale thereof, or of the invalid character of the base lands which were tendered to the Federal government as the basis for the said selection by the State of Oregon, purchased from the said State of Oregon by the plaintiff herein.

XI.

And thereupon your orator further shows unto your Honors:

That subsequently and upon the discovery of the fact that all the proceedings in connection with the attempt to acquire said lands by filing of said lists 178 and 188, so filed as aforesaid, and more particularly

those lands hereinbefore described in paragraph V of this bill of complaint, were irregular, and that by virtue of the filing of said lists the State of Oregon had acquired no interest and did not then have any right, title, or interest in or to the said lands so selected, owing to the invalid character of the base land which had been tendered in exchange therefor, and the further fact that the said selected land had, nevertheless, been sold by the State of Oregon to many innocent purchasers for value, the State of Oregon, acting through the Honorable George E. Chamberlain, its governor, entered into negotiations with the Department of the Interior of the United States, for the purpose of arriving at some arrangement wherein and whereby the interest of these bona fide purchasers from the state might be protected, and as a result of such negotiations, and on or about the 17th day of October, 1903, a letter was promulgated and transmitted to the governor of the State of Oregon by the Honorable Secretary of the Interior of the United States, of which letter the following is in part substantially a copy, to wit:

“It (the state) may within sixty days allowed for appeal amend its selection by the substitution of a valid base, or, if unable to furnish such a base, it may, upon receipt of notice that the selection is held for cancellation, make a formal relinquishment of the selection, and give same to its grantee. While the selection is of record uncanceled the land is segregated thereby, and no right

can be acquired by the presentation of an application therefor (29 L. D. 29), but the purchaser holding the state's relinquishment may present it with his application, and thereby secure the right of entry."

XII.

And thereupon your orator further shows unto your Honors:

That thereafter and in accordance with the terms of the arrangement thus agreed upon, as evidenced by the said letter of the secretary of the interior, the said lieu selection so made as alleged in paragraph VII of this amended bill of complaint was made by the said Aztec Land and Cattle Company, Ltd., a corporation, acting by A. L. Veazie, its attorney in fact, in the interest and for the benefit of the plaintiff herein, and for the purpose of protecting the interests of the plaintiff in and to said selected land acquired by virtue of the purchase so made by the plaintiff from the State of Oregon, as alleged in paragraph X of this amended complaint, and at the time of making said lieu selection so made as alleged in said paragraph VII, and on the 8th day of February, 1904, the said lieu selector, Aztec Land and Cattle Company, Ltd., a corporation, acting by A. L. Veazie, its attorney in fact, presented, simultaneously with and together with the selection as in paragraph VII of this amended complaint alleged, a relinquishment from the State of Oregon of all its right, title and interest in and to the said selected land, which said relinquishment was made by the State of Oregon in the interest and for the bene-

fit of the plaintiff herein, as grantee, which relinquishment is the same relinquishment referred to in paragraph IX hereof.

XIII.

And thereupon your orator further shows unto your Honors:

That the said forest lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, was in all respects regular and in accordance with the requirements of said act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, and in accordance with the requirements of the Secretary of the Interior in his letter of October 17, 1903, hereinbefore set forth in paragraph XI of this amended bill of complaint, and the local officers of the United States land office at Lakeview, Oregon, did, on the 8th day of February, 1904, accept and file the said lieu selection, so made as aforesaid in paragraph VII of this amended bill of complaint, and did on the 4th day of March, 1904, and at subsequent dates, attempt to reject said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, and stated, as a basis for said attempted rejection, that the said lieu selection was in conflict with certain homestead and timber and stone applications, which were made subsequently to the 8th day of February, 1904, and subsequently to the presentation and filing of the lieu selection, together with the relinquishment of the State of Oregon, as alleged in paragraphs VII and XII of this amended bill of complaint.

XIV.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 8th day of April, 1904, said lieu selector and the plaintiff herein, together with other lieu selectors who had made other selections in the interest and for the benefit of the plaintiff herein, appealed from the ruling of the local officers of the United States land office at Lakeview, Oregon, by which ruling the said local officers attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, upon which appeal the said ruling was affirmed by the Commissioner of the General Land Office at Washington, D. C., on or about the 30th day of March, 1905, and subsequently and on or about the 25th day of October, 1905, the Honorable Secretary of the Interior of the United States, acting through the Honorable Frank Pierce, first assistant secretary, reversed the said decision and ruling of the Commissioner of the General Land Office, and directed that said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections similarly made, be allowed as of the date on which they were filed, to wit: the 8th day of February, 1904, and directed the Register and Receiver of the United States Land Office at Lakeview, Oregon, to allow said selections to remain of record as filed.

XV.

And thereupon your orator further shows unto

your Honors:

That subsequently and on or about the 6th day of December, 1905, the local officers of the United States Land Office at Lakeview, Oregon, attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections, and alleged as a ground for said attempted rejection that the land covered by said selections had been withdrawn for the purpose of what was known as the Klamath River Project, and said action of the said Register and Receiver of the United States Land Office at Lakeview, Oregon, in attempting to reject said selections, was subsequently reversed by order and direction of the Commissioner of the General Land Office, made on the 23rd day of January, 1906, who ordered and directed that said lieu selection be allowed as of date February 8th, 1904.

XVI.

And thereupon your orator further shows unto your Honors:

That on or about the 5th day of March, 1906, and the 11th day of June 1906 the Register and Receiver of the United States Land Office at Lakeview, Oregon, made objections to the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, and attempted thereby to reject said lieu selection referred to in paragraph VII of this amended complaint, which attempted objections were sustained on appeal by the Commissioner of the General Land

Office and by the Department of the Interior, on the 20th day of June, 1906, and subsequently and on or about the 15th day of May, 1907, the Department of the Interior of the United States recalled its attempted decision of June 20th, 1906, and entered an order directing the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, as of the date on which said lieu selections were filed, to wit: the 8th day of February, 1904, and ordered and directed that notice of such order be given to all parties who had made entries upon said lands subsequently to the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, which said notice was duly given as directed.

XVII.

And thereupon your orator further shows unto your Honors:

That subsequently, and as a result of the notice so given, a petition for a review of the departmental decision last referred to was filed on behalf of one Archie Johnson, a claimant of part of the said lands embraced by said indemnity lists 178 and 188, which petition set forth the existence of an alleged conspiracy, averred to have been formed for the purpose of acquiring all of the said lands, in the first instance, and that the said lieu selection, so made as aforesaid, was in accordance with, and constituted a part of, said alleged conspiracy, and that the plaintiff herein was not a purchaser in good faith of said land described in paragraph V of this amended complaint, or any part there-

of, which petition for review was allowed, upon the ground that all previous hearings before the Department of the Interior, so had as hereinbefore alleged, were purely *ex parte* and were, consequently, not proper proceedings in which to determine the merits of the adverse claims to the lands in question, for the purpose of basing a final decision thereon, and, therefore, an order was made directing that a final hearing should be held before the Register and Receiver of the United States land office at Lakeview, Oregon, for the purpose of determining the respective merits of various claims to the lands embraced within the said school indemnity lists 178 and 188.

XVIII.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 25th day of May, 1908, said hearing so ordered, as aforesaid, was duly and regularly had before the Register and Receiver of the United States land office at Lakeview, Oregon, the plaintiff herein appearing in person and by attorneys, and the defendant and other adverse claimants appearing in person or by attorneys, at which time the said Register and Receiver, after duly hearing the respective parties, attempted to hold that the various homestead and timber and stone entries hereinbefore referred to in paragraph XIII of this amended complaint and particularly the entry of the defendant which was made on the 10th day of January, 1905, should be allowed, which decision was subsequently, and on or about the 13th day of April,

1909, reversed by the Honorable Commissioner of the General Land Office, who held that the lieu selection referred to in paragraph VII of this amended complaint, together with other selections made in the interest of the plaintiff herein, had been duly and regularly made, and should be allowed to remain intact upon the records of the United States Land Office, as of the date on which they were filed, to wit: February 8th, 1904.

XIX.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the day of '19....., an appeal from the decision of the Honorable Commissioner of the General Land Office, hereinbefore referred to in paragraph XVIII of this amended complaint, was taken by certain alleged homestead and timber and stone claimants, including the defendant, to the Department of the Interior of the United States, which department, acting through the Honorable Frank Pierce, its First Assistant Secretary, found that the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, were filed simultaneously with the relinquishment and cancellation of said indemnity lists 178 and 188, to wit: on the 8th day of February, 1904, and before the attempted filing of the said alleged homestead and timber and stone entries, so made as alleged in paragraphs VIII-XIII of this amended complaint, and further found that the record then before

said department fully showed, and every material fact supported the conclusion, that the plaintiff herein was a purchaser in good faith, free from fraud of any kind, and that the said alleged homestead and other entries, and particularly the entry of the defendant, were made subsequently to the 8th day of February, 1904, and after the filing of the lieu selection, so made as alleged in paragraph VII of this amended complaint, and that said lieu selection, so made as alleged in paragraph VII of this amended complaint, had been allowed by the Secretary of the Interior, as alleged in paragraphs XIV and XVI of this amended complaint, and had been allowed by the Commissioner of the General Land Office, as alleged in paragraph XV of this amended complaint, and, based upon said findings, held that it was within the competency of the officers of the land department of the United States to allow the said alleged homestead and timber and stone entries to be made after the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, and the allowance of said selection, so made as alleged in paragraphs XIV and XV and XVI of this amended complaint, and further held that said lieu selection, so made as allowed, would be denied in all instances where the local officers of the United States Land Office at Lakeview, Oregon, had attempted to allow homestead and timber and stone entries to be made, a copy of which decision is hereunto attached and marked "Exhibit A", and, by reference, incorporated in and made a part of this amended complaint.

XX.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 14th day of July, 1910, and in accordance with the ruling of the decision herein referred to in paragraph XIX of this amended complaint, a patent to the following described lands, situated in the County of Klamath and State of Oregon, and particularly described as follows, to wit:

The southeast quarter of the northeast quarter; the north half of the southeast quarter, and the southeast quarter of the southeast quarter of section eleven, township thirty-seven south, range ten east of the Wilamette Meridian;

was issued in the name of Alvina S. Merrithew, the defendant herein, contrary to, and in violation of, the rights and equities of the plaintiff herein, and that the said patent so issued, as aforesaid, was issued by the officers of the United States government without regard to, and in contravention of, the vested rights of the plaintiff herein, and in accordance with the ruling of the Department of the Interior, as evidenced by the decision referred to in paragraph XIX of this amended complaint.

XXI.

And thereupon your orator further shows unto your Honors:

That this is a suit between citizens of different states, and that the amount in controversy herein ex-

ceeds the amount of three thousand (\$3000) dollars, exclusive of interest and costs.

XXII.

And thereupon your orator further shows unto your Honors:

That he has no plain, adequate, or speedy remedy at law, but only in equity.

WHEREFORE, and forasmuch as your orator is remediless in the premises, under and by strict rules of common law, and can only have relief in a court of equity where matters of this nature are recognizable and reviewable, files this, his amended bill of complaint, and prays:

I. That the defendant may be adjudged and decreed to hold said lands described in paragraph V in trust for your orator, and to convey the same to your orator, and deliver to your orator any patent or other deeds of the same in her possession, and be restrained and enjoined from hereafter setting up any claim or title to said lands or any part thereof, or in any manner intermeddling therewith, or removing any timber or other product therefrom.

II. That the defendant may be adjudged and decreed to hold any timber or other product by her or her servants or agents removed from said land, or the proceeds or manufactured product from the same, in trust for your orator, and may be decreed to account to your orator for the same, or the value thereof, and to repay to your orator said value, with interest from the date of sale, if the same has been sold by the said defendant.

III. That upon the failure of the defendant to make said conveyance and to deliver to your orator any patent or other deeds of the said lands described in said paragraph V, within a period of thirty days from the entry of the decree of this court, the said decree be adjudged and decreed to stand as a conveyance in lieu of such patent or other deeds.

IV. And your orator further prays: That your Honors may grant unto your orator a writ of subpoena of the United States issued out of and under the seal of this Honorable Court, directed to the defendant, Alvina S. Merrithew, therein and thereby commanding said defendant, under a certain penalty therein to be named, personally to be and appear before your Honorable Court, then and there to answer, all and singular, (but not under oath, answer under oath being expressly waived), the matters and things aforesaid, and to stand and abide by and sustain such direction and decree as shall be made herein, as to your Honors shall seem equitable and just.

V. And your orator prays for such further relief in the premises as the nature and circumstances of this cause may require and to your Honorable Court may seem reasonable and proper.

And your orator, as in duty bound, will ever pray.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery, His Solicitors.

Hugh Montgomery,
of Counsel.

[Exhibit "A"]

D. C. M.

G. B. G.

DEPARTMENT OF INTERIOR.

Washington, Feb. 17, 1910.

E--900.

Aztec Land & Cattle Company, Lt'd.

E. B. Perrin

Lieu Selectors,

A. D. Daniels,

Claimant of Beneficial Interest,

vs.

Archie Johnson, et al,

Intervenors.

The Commissioner

Of the General Land Office.

Sir:

This is the appeal of Archie Johnson, et al., intervenors, from your office decision of April 13, 1909, sustaining the claim of A. D. Daniels, beneficiary under Lieu Selections, Nos. 15016, 15017 and 18, (Serials 0714, 0715, 0716) for certain described lands in the Lakeview Land District, Oregon. Questions affecting the validity of these selections have been subject of numerous decisions of the Land Department, and a detail statement of such proceedings covering a period of more than eight years, must of necessity be set out

in detail, if the issues now presented may be properly understood.

January 28, 1902, the lands involved were selected by the State of Oregon, per school indemnity lists Nos. 178 and 188 these lists were held for cancellation by your office, because of invalid base, and were finally cancelled in March and August, 1904, upon relinquishments filed on behalf of the state. The date of the filing of these relinquishments is one of the disputed questions in this record: and while not necessarily controlling, it is in view of this case important, and will be considered on its merits in the progress of this paper.

For present statement, it will be enough to say that the local officers and your office have found that it was filed Feb. 10, 1904, whereas it is claimed on behalf of A. D. Daniels, owner of the Beneficial interest in certain Forest Lieu Selections of these same lands, that it was filed Feb. 8, 1904. However this may be, the Forest Lieu Selections in question were filed on said last named date Feb. 8, 1904, but were rejected by the local officers in a letter to one, L. T. Barin, March 4, 1904, for conflict with certain homestead and timber and stone applications for part of the same lands, These Forest Lieu Selections were filed by Barin in the name of Edward B. Perrin, and Aztec Land and Cattle Co. but the said A. D. Daniels was the beneficial owner of the scrip, which was filed in his interests to protect his purchase from the state under its aforesaid Invalid Indemnity Selections.

On appeal, your office affirmed the action of the

Register and Receiver, giving as further reason and justification thereof the fact, that the Lieu Selections were presented at the local land office prior to cancellation of said Indemnity School Selections, and even prior to the filing of the state's relinquishment. Upon appeal, however, from this action of your office, the Department, Oct. 25, 1905, reversed your office decision, stating while the appeal was pending an affidavit had been filed by A. D. Daniels in which he stated that he was the real party in interest and the equitable owner of the lands assigned as bases for the Lieu Selections; that after its selections of the lands as School Indemnity, the State of Oregon had sold them to sundry purchasers, who paid part of the purchase price and assigned the certificates of sale to him, and he was then the owner thereof; that he thereafter became doubtful as to the validity of the State selection, and in order to protect his interests obtained relinquishments from the State and caused them to be filed in the Local Land Office at Lakeview with Lieu Selections; that in so doing he relied upon your office report of Oct. 13, 1904, (1903) to the Secretary of the Interior; which report was transmitted by the Department to the Governor of Oregon Oct. 17, 1904 (1903).

Considering the appeal, the Department held that the case, was controlled by its decision in the California and Oregon Land Company, (33 L. D. 595), that this case was in all essential respects the same as that one, and remanded the case with directions to adjudicate it thereunder. The Lieu Selections having

been returned to the Register and Receiver for allowance in accordance with said decisions, they were again, on Dec. 6, 1905, rejected by the local officers, for the reason that the lands had been withdrawn by telegram of June 25, 1904, for the Klamath River project. This action of the Register and Receiver was reversed by your officer Jan. 23, 1906, and the selections were remanded to be entered of record as of date Feb. 8, 1904, the day on which they were originally presented, if no other objection appeared. Under dates of March 5, and June 11, 1906, the Register submitted full reports to your office upon the said applications; and stated there were objections to the allowance of the same, in that there were various homesteads and timber and stone applications which had been allowed subsequently to the cancellation of the state's list. The Register also referred to the fact that Daniels had caused a contest to be instituted against the State's selection, and questioned his good faith in the matter.

Separate appeals were taken by the Aztec Land and Cattle Company and Perrin from this action of the local officers, and the papers in connection with the application of the Aztec Company were transmitted to the Department by your office, letter of May 9, 1906, for further consideration in connection with the report of the local office.

Upon consideration of the matter thus presented, the Department held in its decision of June 26, 1906, that the facts failed to show that Daniels, was entitled to protection as a Bona Fide purchaser from the

state; that the State's selections were filed Jan. 28, 1902, while the lands were sold on Jan. 21st, preceding, at which they were public lands of the United States, and no one purchasing them could claim to be a Bona Fide purchaser from the State; that as late as Oct. 5, 1903, Daniels was not asserting that he was a purchaser in good faith from the State, but was acting adversely to it and attempting to contest the lists under which he later asked for recognition as a Bona Fide purchaser and for equitable relief; that this position then was inconsistent with the position later assumed: and if had since acquired assignments of the State's certificates of sale, he had done so with full knowledge of the invalidity of the State's claim; that the facts set forth above were fatal to his contention that he was a Bona Fide purchaser, and as such should be permitted to file the State's relinquishment and obtain precedence over others seeking to appropriate the lands under the General land laws; that to concede to him this privilege under letters Oct. 17 & 13, 1903, mentioned above, would in effect, be to make such persons as from time to time might constitute the State Land Board, agents to dispose of the public lands of the United States, within the State, to such persons as they might favor by means of sales of public land as state land, the subsequent filing of the State's list invalid for want of sufficient base; the filing of the State's relinquishment, and the protection of the purchaser from the state by grace of the Land Department. The Department accordingly held in that decision that the lieu selection should be rejected.

A motion for review of said decision of June 26th, 1906, having been filed by Daniels, Department, on May 15 and 18, 1907, rendered decisions holding that while Daniels, was not, strictly speaking a Bona Fide purchaser from the State, because the Certificates of sale issued by the State antedated the filing of the School Indemnity Selections, and therefore were made at a time when there was no actual claim of the State pending, still Daniels had not purchased the land until the month of April, 1902, nearly three months after the lands had been actually selected by the State, and that having paid a valuable consideration for the lands in an honest belief that a title was being obtained, that was sufficient to constitute a Bona Fide Purchase.

The decision of June 26th, 1906, was therefore recalled, and it was ordered that the Lieu Selection should be reinstated.

In promulgating the decision last mentioned, your office returned the Lieu Selections to the Local Land Office for allowance, and instructed the Register and Receiver to notify all parties who had made entry of said lands subsequently to the cancellation of the State's list to show cause within sixty days why their entries should not be cancelled, because of conflict with said Lieu Selections as a result of which a petition termed, a motion for re-review of Departmental decisions of May 15, and 18, 1907, was filed on behalf of Archie. Johnson who claimed a part of the Lands under a sale made thereof under the Public Land Laws.

This petition or motion charged, in effect, that a conspiracy had been formed for the purpose of acquiring the lands originally by means of the State's selection involved: that the entire proceeding by which title was sought to be acquired was fraudulent, and that the parties thereto should not be allowed to perfect title to the lands, to the injury of those who in good faith had entered the same under the public land laws.

Considering this petition, the Department stated in its decision of August 10th, 1907, that its previous decisions had been *ex parte*, and that the last decision favorable to Daniels did not prevent your office ordering a hearing, or taking other action with respect to the disposition of the claims of others which might be materially affected by the re-instatement of the claim of Daniels; and the case was accordingly remanded to your office for further consideration, to the end that a full and thorough investigation might be made into the matter, and your office was expressly advised that the previous decisions of the Land Department should in no wise embarrass your action in the premises.

A hearing was accordingly ordered; and after due notice to all parties concerned, that the same was had before the local land office, May 25, 1908, Daniels appearing in person and by attorney, and the other parties claiming an interest either in person or by an attorney. The Local Land Office found that the case was not similar in all respects to that of the California and Oregon Land Company cited above; that in

that case there were no intervening rights or equities of other parties, while in the case under consideration the lands had been entered by bona fide settlers or purchasers, to many of whom final certificates had issued and in some instances even Patents had been issued.

The Register and Receiver accordingly recommended that the Homestead and Timber and Stone Entries of the various parties in the case should be allowed to remain in tact. Daniels appealed to your office, whereby your said decision of April 13, 1909, the action of the Local Office was reversed, and it was held that the Lieu Selections should remain in tact.

An appeal on behalf of the Homestead and Timber and Stone claimants brings the case before the Department. Most of the applicants to purchase the lands from the State upon whose supposed initiative these selections were made were not persons in being, but were fictitious persons, usually designated as "Dummies."

But while this is so, there is no evidence in this record showing or tending to show, that Daniels, or any person in privity with him, in fact, was a party to or had any knowledge of the intended fraud; and every material fact in this record supports the conclusion that Daniels bought in good faith, the Certificates of sale issued by the State. He had never heard of these State's Selections until one McHale, a timber land speculator of whom he had no personal acquaintance, but who was known to him by reputation, had reported to him that there was a large body of timber

land for sale, at Klamath, Oregon; and upon McHale's representations, he constituted McHale his agent under powers which amounted to, co-partnership, and McHale went to Klamath Falls to fully investigate these lands and the title thereto. McHale had instructions from Daniels, among other things, to secure the services of an attorney upon the question of title.

He did so. The attorney after an examination of the certificates of sale, reported that the title was good, and McHale's inquiries into the character of the land being satisfactory the results of his investigations was reported to Daniels and the deal was closed, upon the payment by Daniels of \$23,901.10 for the certificates, of sale, and the further payment to the State of the unpaid ballance of the purchase price thereon, amounting to \$3,033.74. Daniels had no personal acquaintance with any of the parties to the transactions; and so far as it appears from this record, he had no knowledge, information or belief which should have caused him to question the bona fides, of the people with whom he was dealing, or cause him to suspect that there was irregularity in the transaction. Nor was there anything in his connection with subsequent events, in his efforts to acquire title to these lands which may reasonably be said to go to the good faith of his purchase. It appears that rumors were soon thereafter rife with reference to land frauds in Oregon in connection with its school land grant.

The rumors reached Daniels and he promptly investigated them, finding for the first time that his title was questionable, upon the advice of his attorney, he initiated a contest against the State's selections upon which his title rested, hoping thereby to protect his purchase by acquiring an equitable preference right.

As a result of this contest, the state refunded the money which he had paid it and put in the hands of his attorney a relinquishment to the United States of all rights under its selections. Daniels then caused said relinquishments to be filed in the District Land Office, together with the Lieu Selections. There was certainly nothing reprehensible in this proceeding. Moreover, it was taken upon certain suggestions made in your said report of October 13, 1903. This report was responsive to a letter from the Governor of Oregon, September 28, 1903, wherein the inquiry was made of this department as to the means of protecting bona fide purchasers of the school indemnity lands from the State in instances where the State's selections had been cancelled for invalid base. Your offices reported among other things, and this is the same report transmitted to the Governor of Oregon, Oct. 13, 1903, that as to such selections—

while the selection is of record and **uncancelled**, the land is segregated thereby, and no right can be acquired by the presentation of an applicaiton therefor (29 L. D. 29), but the purchaser holding the State's relinquishment may present it with his application and thereby secure right of entry.

This is also the plain holding of this Department in the in California and Oregon Land Company, *supra*, and is precisely the course pursued by Daniels in this case. His contest against the State's selection was to that end. He secured the State's relinquishments and presented them with the aforesaid applications to scrip the land.

It is true the record shows that the relinquishments were not marked, filed, in the local office until Feb. 10, 1904, which was two days after the presentation of the scrip applications.

It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been received on February 8, instead of February 10, the filing would have been noted on the day they were received.

But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the State's relinquishments were, in fact, filed simultaneously.

The filing was by mail, and the letter of transmittal was written by Daniel's attorney, the said L. T. Barrin.

The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the action of the local officers at the time in rejecting the proffered

scrip applications, is put upon the ground that part of the lands were covered by pending homestead and timber and stone applications, whereas if the State had not then relinquished its school indemnity selections, the local officers would surely have assigned this as the reason for rejection of said applications, because this reason would have applied to all of the lands involved, instead of only a small portion of them, as was the case with the reason assigned.

It is worthy of too, that there has not been found any correspondence or record which would indicate that if the said Barin, had left these relinquishments out of his letter by inadvertence, they were ever afterwards transmitted to the local land office, and no correspondence or record of correspondence showing that if he had been guilty of such inadvertence he was ever advised thereof by the local officers.

I conclude therefore, on this branch of the case that the relinquishments in question and the scrip applications were filed at the same time, as was suggested they might be, in your office report of September 28th, 1903, above quoted.

Under existing regulations, it was the duty of the Register and Receiver to forward these applications, and these relinquishments without action for the consideration and disposition of your office. This however, it has been seen, was not done.

The scrip applications were rejected, and the history of the case, hereinbefore set out, shows that these applications were kept alive by successive appeals,

and that the case was twice remanded to the local officers, with directions to allow the applications, but various reasons were assigned for the neglect or failure of the local officers to obey these instructions.

It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the Secretary had been carried out, it would have been done before the case became complicated by the counter-equitable considerations arising upon the unfortunate allowance of the Homestead and Timber and Stone entries for most of these lands. It is thought however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the Department would not be justified in cancelling such entries and filing, for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition.

See *Hoyt vs. Weyerhauser et al*). (161 F. E. D., Rep., 324).

It appears however, from your office reports of Dec. 16, 1909, that there are approximately 107 quarter Sections of land involved in this case. Of these, twenty-eight are involved in homestead entries, four

in cash entries and homestead entries, twenty-four in cash entries, twenty-five in Timber and Stone sworn statements, twelve are free and unappropriated, eight of them do not appear to be covered by the Lieu Selections in question, and seven of them have been patented.

In view of what has been said, the claim of Daniels must be denied as to all of them except those covered by Timber and Stone sworn statements only, and those that are unappropriated, amounting to what seems to be, from your office reports, approximately thirty-seven quarter sections in all.

As to these lands, the Timber and Stone applicants have not put themselves in privity with the United States, and the Land Department has not entered in to such Contract with them as to preclude other disposition of the lands.

See *Campbell vs. Weyerhauser et al* (161 Fed. Rep., 332).

This being true, and believing that the equities of Daniels should be protected to the fullest extent consistent with equitable administration, I have to direct that the Scrip applications be allowed as to all tracts which have not been otherwise disposed of, and rejected as to such as now appear to be covered by Homestead and cash entries.

The decision appeal from is modified. The papers are herewith returned.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

Enclosures.

[Endorsed]: Amended Bill in Equity. Filed May 4, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of May, 1912,
there was duly filed in said Court, a Demurrer, in
words and figures as follows, to wit:

[Demurrer to Amended Bill of Complaint.]

*In the District Court of the United States for the
District of Oregon.*

A. D. DANIELS,

Plaintiff,

vs.

ALVINA S. MERRITHEW,

Defendant.

TO THE HONORABLE JUDGES OF THE DIS-
TRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF OREGON:

The demurrer of the above named plaintiff, Alvina
S. Merrithew, to the amended bill of complaint of the
above named plaintiff.

The defendant, by protestation, not confessing or
acknowledging all or any of the matters or things in
said amended bill of complaint contained to be true
in such manner and form as the same are therein set
forth and alleged, demurs to the said amended bill.

And for cause of demurrer shows:

I.

That it appears by plaintiff's own showing by the
said amended bill that he is not entitled to the relief

prayed by said amended bill against this defendant.

II.

That the said bill of complaint is wholly without equity.

Wherefore, and for divers other good causes of demurrer appearing on said amended bill, this defendant demurs thereto, and she prays the judgment of this Honorable Court whether she shall be compelled to make further or any answer to the said bill; and she humbly prays that she may be hence dismissed with her reasonable costs in her behalf sustained.

ARTHUR I. MOULTON.

P. A. LAFFERTY,
Solicitors for Defendant.

STATE OF OREGON,

County of Multnomah—ss.

I, Arthur I. Moulton, being first duly sworn, on oath say: That I am one of solicitors for defendant in the within and foregoing cause; that in my opinion the foregoing demurrer is well taken in point of Law.

ARTHUR I. MOULTON.

Subscribed and sworn to before me this 24th day of May, 1912.

[Seal.]

P. A. LAFFERTY,
Notary Public for Oregon.

STATE OF OREGON,

County of Multnomah—ss.

I, Alvina, S. Merrithew, being first duly sworn on oath say: That I am the defendant in the foregoing cause; that the foregoing demurrer is not interposed

for the purpose of delay.

ALVINA S. MERRITHEW,

Subscribed and sworn to before me this 24th day of May, 1912.

[Seal.]

P. A. LAFFERTY,

Notary Public for Oregon.

[Endorsed]: Demurrer. Filed May 29, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 15 day of July, 1912, the same being the 12 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Decree.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

ALVINA S. MERRITHEW,

Defendant.

This cause came on to be heard on the demurrer of the defendant to the AMENDED BILL IN EQUITY of the Plaintiff herein, and the plaintiff appeared by his attorneys, Platt & Platt and Hugh Montgomery, and the defendant appeared by her attorneys, Arthur I. Moulten and P. A. Lafferty; and

the Court having heard the argument of counsel for the respective parties and having taken the said cause under advisement and fully considered the same, and now being fully advised therein, and it appearing to the Court that said demurrer is well taken and should be sustained,

IT IS HEREBY ORDERED, CONSIDERED, ADJUDGED AND DECREED by the Court that the said demurrer be and the same is hereby in all respects sustained, and that the amended bill of complaint of the plaintiff herein, be and the same is hereby dismissed, and that defendant herein have and recover of and from the said plaintiff, her costs and disbursements herein, taxed at Dollars.

Dated this 15th day of July, 1912.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition for Appeal.]

*In the District Court of the United States for the
District of Oregon.*

A. D. DANIELS,

Plaintiff,

vs.

ALVINA S. MERRITHEW,

Defendant.

The above named plaintiff conceiving himself aggrieved by the order and decree made and entered in the above entitled cause on the 15th day of July, 1912, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings and all things concerning the same, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon his filing a bond for the payment of all damages and costs if he fails to prosecute the said appeal to effect which bond shall act as a supersedeas bond.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery, Solicitors for Plaintiff.

Hugh Montgomery,
of Counsel.

[Endorsed]: Petition for Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

*In the District Court of the United States for the
District of Oregon.*

A. D. DANIELS,

Plaintiff,

vs.

ALVINA S. MERRITHEW,

Defendant.

Now on this 29th day of August, 1912, comes the above named plaintiff, A. D. Daniels, appearing by Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record, and says that in the record and proceedings of the above entitled Court, in the above entitled cause, and in the final order and decree entered therein on the 15th day of July, 1912, there is manifest error, and that said order and decree is erroneous and against the just rights of said plaintiff, and for error the said plaintiff assigns the following.

I.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the plaintiff, on the 8th day of April, 1904, made a valid forest lieu selection of the lands described in paragraph V of plaintiff's amended bill filed in said cause under and in accordance with the provisions of the Act of Congress of June 4th, 1897, set forth in paragraph VI of plaintiff's amended bill of complaint.

II.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that by the admissions of the demurrer, the forest lieu selection of the plaintiff, made upon the land described in paragraph V of his amended bill of complaint, was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly the defendant.

III.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the attempted homestead entry of the defendant was subsequent in time and inferior in right to the forest lieu selection of the plaintiff.

IV.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the forest lieu selections of the plaintiff had been approved by the proper officers of the United States government, which approval gave the plaintiff a vested interest in the land so selected.

V.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the alleged homestead entry of the defendant was made in contravention of the vested

rights of the plaintiff herein.

VI.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the plaintiff was equitably entitled to be protected in the forest lieu selections which he had made on the lands described in paragraph V of his amended bill of complaint as against the claims of the defendant or any person or persons whomsoever.

VII

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the plaintiff was equitably entitled to have the defendant declared a trustee for the plaintiff of the lands described in paragraph V of his amended bill of complaint.

VIII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that the bill of complaint stated a good cause of action to which the defendant should be required to file his answer or plea.

IX.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint and decreeing that said amended bill of complaint be dismissed and allowing costs to the defendant.

WHEREFORE, the plaintiff and appellant prays that the decree of said court be reversed and such

directions be given that full force and efficacy may en-
ure to the plaintiff by reason of the cause of suit set
up in his amended bill of complaint filed in said cause,
and that a decree be entered in accordance with the
prayer of plaintiff's amended Bill of Complaint.

PLATT & PLATT and HUGH MONTGOMERY,
Solicitors for Plaintiff.

Hugh Montgomery,
of Counsel.

[Endorsed]: Assignment of Errors. Filed Aug.
29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912,
there was duly filed in said Court, an Order Al-
lowing Appeal, in words and figures as follows,
to wit:

[Order Allowing Appeal.]

*In the District Court of the United States for the
District of Oregon.*

A. D. DANIELS,

Plaintiiff,

vs.

ALVINA S. MERRITHEW,

Defendant.

This day came A. D. Daniels, plaintiff, appearing
by Messrs. Platt & Platt and Hugh Montgomery, his
solicitors of record and presented his petition for an
appeal and an assignment of errors accompanying the
same which petition, upon consideration of the court,

is hereby allowed, and the court allows an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon the filing of a bond in the sum of \$500 with good and sufficient surety to be approved by the court; and

It is further ordered that said bond shall act as a supersedeas bond, and

It is further ordered that a certified transcript of the record, and all proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

R. S. BEAN,
Judge.

Dated this 29th day of August, 1912.

[Endorsed]: Order Allowing Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

*In the District Court of the United States, for the
District of Oregon.*

A. D. DANIELS,

Plaintiff,

vs.

ALVINA S. MERRITHEW,

Defendant.

KNOW ALL MEN BY THESE PRESENTS:

That we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, corporation, surety, are held and firmly bound unto Alvina S. Merrithew, in the full and just sum of five hundred (\$500) dollars to be paid to the said Alvina S. Merrithew, her executors, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

Selaced with our seals this 29th day of August, A. D., 1912.

WHEREAS, lately at the District Court of the United States for the District of Oregon, in a suit pending in said court between A. D. Daniels, plaintiff, and Alvina S. Merrithew, defendant, a decree was rendered against said plaintiff, A. D. Daniels, and said A. D. Daniels having petitioned an appeal and filed a copy thereof in the clerk's office in said court to reverse the same in the aforesaid suit, and a citation directed to the said Alvina S. Merrithew citing and admonishing her to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be holden in the city of San Francisco in said Circuit, on the 28th day of September, A. D., 1912, having been served on said defendant;

NOW, the condition of this obligation is such, that if the said A. D. Daniels shall prosecute his appeal to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation

to be void, else to remain in full force and virtue.

A. D. DANIELS,

By Platt & Platt, His Solicitors of Record.

FIDELITY & REPOSIT COMPANY OF MARY-
LAND,

[Seal.]

By W. J. CLEMENS,

Agent.

By Harrison G. Platt.

Examined and approved this 29th day of August,
1912.

R. S. BEAN,

District Judge.

[Endorsed]: Bond on Appeal. Filed Aug. 29,
1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of August, 1912,
there was duly filed in said Court, a Citation on
Appeal, in words and figures as follows, to
wit:

[Citation on Appeal.]

*In the United States Circuit Court of Appeals
for the Ninth Circuit.*

A. D. DANIELS,

Appellant,

vs.

ALVINA S. MERRITHEW,

Appellee.

UNITED STATES OF AMERICA,

Ninth Judicial Circuit—ss.

TO ALVINA S. MERRITHEW, GREETING:

WHEREAS, A. D. Daniels, appellant in the above entitled suit has lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in the District Court of the United States for the District of Oregon, made in favor of you, the said Alvina S. Merrithew, and has filed the security required by law; you are therefore hereby cited to appear before the said United States Circuit Court of Appeals at the City of San Francisco, State of California, on the 28th day of September, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the City of Portland in the Ninth Judicial Circuit this 29th day of August, in the year of our Lord, one thousand nine hundred twelve.

R. S. BEAN,

Judge of the District Court of the United States,
in and for the District of Oregon.

UNITED STATES OF AMERICA,

District of Oregon—ss.

Due service of the within Citation to Appellees, by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 30 days of August, 1912.

ANGELL & FISHER,
of Attorneys for Appellees.

[Endorsed]: Citation to Appellee. Filed Aug. 30, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Saturday, the 28 day of September, 1912, the same being the 77 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

*In the District Court of the United States for the
District of Oregon.*

A. D. DANIELS,

Plaintiff,

vs.

ALVINA S. MERRITHEW,

No. 3710.

September 28, 1912.

Now, at this day, for good cause shown, it is ORDERED that the plaintiff's time for filing and docketing the record on appeal in this cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same is hereby enlarged and extended ninety (90) days from this date.

R. S. BEAN,
Judge.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

ALVINA S. MERRITHEW,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District
Court for the District of Oregon

STATEMENT OF THE CASE.

On and prior to the 12th day of April, 1902, one Edward B. Perrin and the Aztec Land and Cattle Company, Ltd., a corporation, were each the owners in fee simple, free of any liens or incumbrances, of certain real property located in the Territory of Arizona, and continued to be such owners up until the 2d day of February, 1904. On the 12th

day of April, 1902, these lands were included within the limits of the San Francisco Mountains Forest Reserves, pursuant to a proclamation issued by the President of the United States. Subsequently and on the 2d day of February, 1904, these parties, acting under and in accordance with the provisions of the Act of Congress passed the 4th day of June, 1897, which Act provided amongst other things that the owners of lands embraced within the limits of a forest reservation might deed back their interests to the United States and select in lieu thereof any unoccupied public land, relinquished and conveyed to the United States their interest in the Arizona land referred to, recorded said deed at the proper office in the county where the land was situated, and on the 8th day of February, 1904, made lieu selections of certain lands situated in the County of Klamath, State of Oregon, which lieu selections were made for the benefit of the appellant in this case. The selections were perfected by presenting the recorded deed, together with a full, true and correct abstract of title showing that the selectors were the owners in fee simple of the lands relinquished, immediately prior to the time the deed to the United States was recorded, as required under the rules issued by the Secretary of the Interior of the United States.

Prior to the time that these selections were made and on or about the 28th day of June, 1902, the State of Oregon had filed upon the property

so selected certain instruments purporting to be school indemnity lists, and before the approval of these lists, had sold the land to the appellant in this case. It afterwards developed that the selections so made by the State of Oregon were rejected upon the ground that the base land which the State had tendered in exchange for the land embraced in its school indemnity lists was not proper base land. The appellant in this case had purchased these lands from the State of Oregon in good faith, but found that the State had given him nothing in exchange for the consideration which he paid. For the purpose of protecting his interests thus acquired, the forest lieu selections already referred to, were made.

At the time of making these selections the lieu selectors presented and filed together with their lieu selections, relinquishments from the State of Oregon of any rights which it might have acquired by virtue of the school indemnity lists filed as above stated. The Secretary of the Interior had held that the filing of school indemnity lists, regardless of their validity, segregated the lands filed upon from the public domain, and therefore these relinquishments were presented in order to relieve the lands in question from the effect of such segregation.

After the making of these lieu selections and the filing of these relinquishments, the officers of the United States Land Office, located at Lake-

view, Oregon, allowed other entries to be made upon the lands so selected, which entries were in direct conflict with the forest lieu selections so made as above stated. This conflict resulted in several successive appeals to the Interior Department of the United States, which appeals extended over a period of about six years. During the continuance of these appeals and on the 25th day of October, 1905, the Secretary of the Interior directed that the forest lieu selections so made as above stated be allowed as of the date on which they were filed, to-wit: February 8, 1904. This the local officers at Lakeview, Oregon, refused to do on the ground that the lands had been withdrawn for what was known as the Klamath River Project. As a result of this refusal the matter again came before the Secretary of the Interior and on June 26, 1906, he again ordered and directed that the said lieu selections be reinstated. After the making of the order last referred to a petition for a review of the entire proceedings was filed on behalf of an individual by the name of Archie Johnson, a speculator who was trying to procure these lands, which petition was allowed. A rehearing of all the facts took place before the Register and Receiver of the local land office at Lakeview, Oregon, which officers recommended that the forest lieu selections be disallowed and the other entries reinstated. This recommendation of the local officers was refused by the General Land Office on the 13th day of April,

1909, at which time the Commissioner of the General Land Office directed that the forest lieu selections referred to be allowed to remain intact. This last named ruling was taken before the Secretary of the Interior, and on the 17th day of February, 1910, the Secretary of the Interior held that although the forest lieu selections referred to were in all respects regular and should have been allowed when presented, still it was within the competency of the officers of the United States Land Department to dispose of the lands to whomsoever they might choose and that having done so the entries which were in conflict with these forest lieu selections would be allowed and the rights of the lieu selectors, and the appellant in this case, would be denied in all instances where such conflict had occurred.

The appellant having exhausted all the remedies which were available to him in the proceedings before the Land Department waited until a patent to the lands involved was issued to the appellee in this case, and then instituted the present suit to have the appellee declared a Trustee of said lands for the appellant, invoking the well-known and well established principle that where the officers of the general government through the application of an erroneous principle of law or a wrong interpretation of a statute, confirm title to public lands to one entryman in an instance where another entryman is lawfully entitled thereto, courts of equity will

intervene and declare the party to whom title has been wrongfully confirmed a Trustee of the party to whom the land rightfully belongs.

On the 26th day of January, 1911, the appellant filed in the District Court of the United States for the District of Oregon, a bill of complaint setting forth the facts substantially as above stated, to which bill of complaint the court sustained a demurrer interposed by the appellee.

Subsequently, and on or about the 4th day of May, 1912, the appellant filed an amended bill of complaint, to which amended bill of complaint the court again sustained a demurrer interposed by the appellee upon the ground that the amended bill of complaint failed to state facts sufficient to constitute a cause of suit. A decree was entered dismissing the case and from this decree an appeal has been perfected.

SPECIFICATION OF ERRORS.

The errors relied upon by the appellant are as follows:

First. The trial court erred in not holding that by the admissions of the demurrer filed by the appellee to the appellant's amended bill of complaint the appellant did on the 8th day of February, 1904, make a valid forest lieu selection of the lands embraced in Paragraph 5 of his amended bill of complaint, and that said forest lieu selection so

made was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever and particularly the appellee, and in not holding that by the admissions of the demurrer the attempted timber and stone entry of the appellee was subsequent in time and inferior in right to the forest lieu selection of the appellant.

Second. The trial court erred in sustaining the demurrer to appellant's amended bill of complaint, in that it did not hold that by the admissions of the demurrer the forest lieu selection of the appellant had been approved by the proper officers of the United States Government, which approval gave the appellant a vested interest in the land so selected against the claim or claims of all persons whomsoever and particularly the appellee.

Third. The trial court erred in not holding that by the admissions of the appellee's demurrer the alleged timber and stone entry of the appellee was made in contravention of the vested rights of the appellant, and because the trial court erred in sustaining the demurrer to the appellant's amended bill of complaint in that it did not hold that by the admissions of the demurrer the appellant was equitably entitled to be protected in the forest lieu selection, which he had made upon the lands described in Paragraph 5 of his amended bill of complaint as against the claims of the appellee or any persons whomsoever.

Fourth. The trial court erred in sustaining the demurrer to appellant's amended bill of complaint in that it did not hold that by the admissions of the demurrer the appellant was equitably entitled to have the appellee declared a Trustee for the appellant of the lands described in Paragraph 6 of his amended bill of complaint.

Fifth. The trial court erred in sustaining the demurrer to the appellant's amended bill of complaint in that it did not hold that said amended bill of complaint stated a good cause of suit to which the appellee should be required to file her answer or plea, and in decreeing that appellant's amended bill of complaint be dismissed and in allowing costs to the appellee.

Sixth. The trial court erred in not holding that by a proper construction of the Act of Congress of June 4, 1897, the appellant was entitled to have his forest lieu selection of the lands embraced in Paragraph 5 of his amended bill of complaint sustained as against the entry of the appellee and that by a proper construction of said Act the appellee should be declared a Trustee for the appellant of the lands described in Paragraph 5 of appellant's amended bill of complaint, which lands were patented to the appellee, all of which matters and things constitute and present a Federal question.

POINTS AND AUTHORITIES.

I.

Whenever lands are embraced within a forest reservation pursuant to a proclamation of the President of the United States, the owners of such land might prior to March 3, 1905, select in lieu thereof any vacant unoccupied public land of the United States.

Act of June 4, 1897, 30 Stat. at L. 36; U. S. Comp. Stat. 1901, p. 1541.

II.

Courts of equity have power to grant relief to an individual aggrieved by the erroneous decision of a legal question by the department officers.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 109; 47 Law. Ed. 91, 96.

III.

If a patent to land to which one is entitled has been improperly issued by the United States to another, the courts will quiet the title of the former or adjudge the other a Trustee of the title for him.

Loney v. Scott, 112 Pac. 172, 175 (Ore. 1910).

Morrow v. Warner Valley Stock Co., 101 Pac. 171, 185 (Ore. 1909).

Lee v. Johnson, 116 U. S. 48, 49; 29 Law. Ed. 570.

Kerns v. Lee, 142 Fed. 985, 988 (C. C. D. Ore. 1906).

Stark v. Starrs, 6 Wall. 402, 419; 18 L. Ed. 925, 930.

Silver v. Ladd, 7 Wall. 219, 228; 19 L. Ed. 139, 141.

Shepley v. Cowan, 91 U. S. 330, 340; 23 L. Ed. 424, 428.

IV.

The filing of a lieu selection segregates the land upon which the filing is made from the public domain and cuts off all intervening and subsequent rights as against the lieu selector.

Weyerhauser v. Hoyt, 219 U. S. 380, 388; 55 L. Ed. 258, 261.

Santa Fe Pacific R. R. Co., 41 L. D. 96, 98 (June, 1912).

V.

The Act of June 4, 1897, created a standing offer upon the part of the Government to exchange the land within a forest reservation for any unoccupied public land, and this offer once accepted be-

comes a contract between the Secretary of the Interior and the lieu selector.

Roughton v. Knight, 219 U. S. 544; 55 L. Ed. 326, 327.

VI.

The power of supervision possessed by the officers of the Land Department, to correct or annul entries of land or change their prior rulings or set aside the action of the local land officers is not an unlimited or arbitrary power.

Cornelius v. Kessel, 128 U. S. 456, 461.

Ballinger v. United States ex rel. Frost, 216 U. S. 240, 248; 54 L. Ed. 465, 468.

Peyton v. Desmond, 129 Fed. 1, 9 (C. C. A. Eighth Circuit, 1904).

Howe v. Parker, 190 Fed. 738, 757 (C. C. A. Eighth Circuit, 1911).

VII.

Under the Act of June 4, 1897, a vested interest is created by the filing of a forest lieu selection.

Olive Land and Development Co. v. Olmstead, 103 Fed. 568, 574 (C. C. Cal., 1900).

VIII.

The power of approval being a judicial power, imposes upon the Secretary of the Interior the duty

to determine the lawfulness of selections as of the time when the exertion of the authority is invoked by the lawful filing of a selection list.

Weyerhaeuser v. Hoyt, 219 U. S. 380, 387;
55 L. Ed. 258, 261.

IX.

If the case made by the plaintiff is one which depends upon the proper construction of an Act of Congress, with a contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States.

Northern Pacific Railroad Company v. Soderberg, 188 U. S. 526, 528; 47 L. Ed. 575, 581.

X.

It is a well established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him.

Lytle v. The State of Arkansas, 9 How. 314, 332.

ARGUMENT.

The amended bill of complaint filed by the appellant in the case at bar proceeded upon the theory that where the public land officers of the United States Government make an application of an erroneous principle of law or adopt an erroneous construction of a statute in determining the rights of claimants to public land, a court of equity will intervene after the issuance of patent and declare the patentee to be the holder of the land in trust for the party to whom the land should be awarded. This principle has been announced by an almost unbroken line of decisions, and was very concisely and accurately stated by the Supreme Court of the United States in the case of *Lee v. Johnson*, 116 U. S. 48, 49; 29 L. Ed. 570, in which case the following language was employed:

“If, however, those officers mistake the law applicable to the facts, or misconstrue the statutes, and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. The court in such a case merely directs that to be done which those officers would have done if no error of law had been committed.”

Lee v. Johnson, 116 U. S. 48, 49; 29 L. Ed. 570.

The decision of the Secretary of the Interior Department determining the rights of the respective

claimants to the land involved in the case at bar, is attached to and made a part of the appellant's amended bill of complaint and appears on pages 20 to 33 inclusive of Appellant's Transcript of Record. This decision after setting forth the facts hereinbefore presented in our statement of this case, proceeded to hold that the forest lieu selections of the appellant were in all respects regular and in accordance with the requirements of the rules governing forest lieu selections, and continued as follows:

"It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the secretary had been carried out it would have been done before the case became complicated by the counter equitable considerations arising upon the unfortunate allowance of the homestead and timber and stone entries for most of these lands. It is thought, however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the department would not be justified in cancelling such entries and filings for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the land department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition."

See *Hoyt v. Weyerhaesuer et al.* (161 Fed. Rep. 324).

Appellant's Transcript of Record, page 32.

The language thus quoted presents in its own words the error which has deprived appellant of his rightful interests. The very case cited in support of this error was afterwards reversed by the Supreme Court of the United States and its decision in this particular will be referred to later. When the Secretary said "That Daniel's application was in all respects regular and might have been allowed when presented," he directly contradicted the previous findings of the very decision in which this language was used. It appears from this decision that the department directed the allowance of these selections on October 25, 1905. (Appellant's Transcript of Record, pages 22, 23.) The same decision also shows that on June 26, 1906, the department again ordered that the lieu selections be reinstated. (Appellant's Transcript of Record, page 25.) Again it appears from the face of the same decision that the General Land Office directed on April 13, 1907, that said lieu selections remain intact. (Appellant's Transcript of Record, page 27.)

The appellant contends that the power of the Land Department to determine the validity of entries or selections is not an arbitrary or unlimited power, and that in the exercise of such power the department is not permitted to dispose of public lands to whomsoever it wishes, but must follow the directions of the law governing the acquisition of such lands and determine whether or not all required acts in connection with the acquisition there-

of have been performed. The appellant further contends that where the Land Department finds all such necessary acts to have been performed in connection with a selection of public land in lieu of land included within the limits of a forest reservation, as provided by the Act of June 4, 1897, and has once approved such a selection, that the said department can not thereafter disallow such selection in favor of a right which was subsequent in time to the right first initiated.

The Act referred to provides among other things as follows:

“That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reservation the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: Provided further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.”

Act of June 4, 1897, 30 Stat. at L. 36; Vol. 2, U. S. Comp. Stat. 1901, p. 1541.

Appellant's Transcript of Record, page 4.

The above Act was construed by the Circuit Court of the United States for the Southern District

of California in the case of Olive Land and Development Co. v. Olmstead, 103 Fed. 568, in which case his honor, Judge Ross, held that a mere filing of a forest lieu selection created a vested interest in the lands selected without reference to the approval of any Land Department officer. The language used in this particular was as follows:

“And, turning to the act under consideration, it is seen, and as has already been observed, that the power to ‘select’ is by the statute given to the party who is invited to make the exchange, provided always that he confines his selection to the class of lands described in the statute, to-wit: Those vacant and open to settlement. No other condition is imposed by the statute. The act in question differs very materially in this respect from the indemnity clauses of many of the railroad and other grants, requiring the selections to be made by and with the advice, consent, direction or approval of some officer of the land department, in which case such consent or approval is deemed a condition precedent to the vesting of any interest in the selected land.”

Olive Land and Development Co. v. Olmstead,
103 Fed. 568, 574 (C. C. Cal., 1900).

The appellant, relying upon the language of this case, argued in the court below that the mere filing of his forest lieu selection created in him a vested interest in the land selected as against all others, without reference to the approval of the Interior Department, and that said department could only disapprove his selection for failure to comply with the requirements of the statute, such as his inability

to show good title to the land relinquished, or to establish that the land selected was public, unoccupied, non-mineral land, free and open to entry. The trial court, however, held that the case of *Olive Land and Development Co. v. Olmstead* was now of no force and effect for the reason that Judge Ross in the case of *Cosmos Exploration Company v. Gray Eagle Oil Company*, 104 Fed. 20, 34, had explained that the case of *Olive Land and Development Co. v. Olmstead*, 103 Fed. 568, had been decided without reference to the rules of the Land Department regulating the procedure of applicants for exchange of lands under the Act of June 4, 1897, and for the further reason that the Supreme Court of the United States in the same case of *Cosmos Exploration Company v. Gray Eagle Oil Company*, 190 U. S. 301, 312; 47 L. Ed. 1064, 1072, had held that the mere filing of papers was not sufficient to create an equitable title and that a decision as to the validity of the filing was necessary.

(See opinion of trial court, pages 23, 24, Appellant's Transcript of Record, in *Case of Daniels v. Wagner*, No. 2217.)

The Supreme Court of the United States, in the case last referred to, used the following language:

"There must be a decision made somewhere regarding the rights asserted by the selector of land under the act before complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the

statute, and the selector cannot decide the question for himself."

Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 312; 47 L. Ed. 1064, 1072.

The language last quoted presents nothing which is in conflict with the holding of Judge Ross in the case of *Olive Land and Development Co. v. Olmsted*, 103 Fed. 568, 574. The holding of Judge Ross was merely to the effect that the filing of a forest lieu selection initiated a vested right and created a vested interest. He did not hold, however, that such a right could be initiated and such an interest created by the mere filing of papers. The case contemplated that the selector must file the proper kind of papers and select the proper kind of land. These questions must, of course, be determined by the officers of the Land Department, and these very questions were determined in favor of the appellant in the case at bar, as shown by the allegations of his amended bill of complaint, which allegations are admitted by the appellee's demurrer. It is not claimed that the mere making of a lieu selection creates a complete equitable title, but it is claimed that the filing of such a selection segregates the land selected from the public domain and initiates a vested right and creates a vested interest which may ripen into a complete equitable title, when it is finally determined that the selection is in all respects regular.

Furthermore, the language quoted from the case of *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301; 47 L. Ed. 1064, 1072, was mere dicta in the case then before the court, and the real question decided was that in the case then under consideration, no decision whatsoever had been made by the Land Department with reference to the validity of the selection there made. The following language establishes this conclusion:

“Concluding, as we do, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished has never been decided by the land department, but is still properly before that department, the courts cannot take jurisdiction and proceed to decide such questions themselves.”

Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 315; 47 L. Ed. 1064, 1073.

What application can the principles of law as applied to the facts before the court in the case last cited have with reference to the facts of the case at bar, wherein it is admitted that the selections of the appellant were in all respects regular, and such facts had been so determined by the Secretary of the Interior? We venture also to assert that no language can be found in the case of *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301; 47 L. Ed. 1064, which in any manner contravenes or contradicts the doctrine announced by Judge Ross in the case of *Olive Land and De-*

velopment Co. v. Olmstead, 103 Fed. 568, 574, holding that the filing of a forest lieu selection initiates a vested right and creates a vested interest, as against all subsequent entries without regard to the approval of the Land Department.

It has also been many times held that even in instances where the approval is necessary, such power of approval is neither arbitrary nor unlimited and can not be exercised without regard to established principles of law. This very rule was announced by the Circuit Court of Appeals for the Sixth Circuit, speaking through Mr. Justice Van Devanter. The case referred to holds as follows:

“But the power of the land department to review its prior holdings and to cancel existing entries is not unlimited or arbitrary.”

(Citing *Cornelius v. Kessel*, 128 U. S. 456; 32 L. Ed. 482.)

Peyton v. Desmond, 129 Fed. 1, 9 (C. C. A., Eighth Circuit, 1904).

Again:

“Neither the general jurisdiction nor the supervisory power of the commissioner or of the secretary is arbitrary or unlimited. The effective exercise of each is conditioned by established rules of law. The settled rules and practice and the uniform decisions of the department constitute both rules of law and of property, and equitable titles in entrymen cannot be destroyed by the Land Department in violation of them. System, order and the uniform application of the established

rules and practice of the department to all litigants alike are as essential to the administration of justice in the land department as in the courts. What a farce the attempt to secure or protect rights in any judicial or quasi-judicial tribunal must become if its rules and decisions are ignored or applied to each case as it arises at the arbitrary will of the officer who presides. Equitable titles of claimants to lands under the acts of Congress may not be annulled by the land department in violation of its settled practice or of a rule of law and of property established by a long line of decisions of its officers, nor without legal notice to the parties in interest and an opportunity to be heard."

Howe v. Parker, 190 Fed. 738, 757 (C. C. A., Eighth Circuit, 1911).

As already shown by a reference to the decision of the Secretary of the Interior attached to the appellant's amended bill of complaint, he arbitrarily held that regardless of the regularity of the appellant's application and regardless of the unfortunate action of the local land office in allowing subsequent entries to be made, the Land Department would not cancel those entries for the mere purpose of protecting the equities of Daniels. This was one of those special cases referred to in the decision last cited where established rules and decisions were ignored at the arbitrary will of the presiding officer and the admitted equities of the appellant brushed aside by a mere stroke of the pen, and this appellant is here now asking this court whether or not such equitable titles as his can be thus an-

nulled in direct violation of even that most elementary principle that "first in time is first in right," assuming other equities to be equal. Not only was the appellant first in time, but he was likewise first in all other things save in receiving the proper protection of his vested interests.

Regardless, however, of the question whether or not under the provisions of the forest lieu selection act above cited the approval of the Land Department is necessary in order to create a vested interest, and regardless of whether or not that very department can exercise its own wayward will in determining the matters before it, and regardless of whether it can three times approve a selection and then arbitrarily review its prior rulings and cancel entries confirmed thereunder, nevertheless, it has been held that even in those instances where the requisite of approval has been made a condition precedent to the vesting of any interest by the very statute giving the right, the initiation of that right is sufficient to give it validity as against all others by virtue of its being first in time. This principle was announced by the Supreme Court of the United States in the very recent case of *Weyerhaeuser v. Hoyt*, 219 U. S. 380; 55 L. Ed. 258. In this case a lieu selection had been made by the Northern Pacific Railway under and in accordance with the provisions of the Act of July 2, 1864 (13 Stat. at L. 365, 367, Chap. 217), and the joint resolution of May 31, 1870, 16 St. at L. 378, and before

the approval of this selection, but subsequent to its filing, an application was made to purchase the land under the Timber and Stone Act. The selection of the Railroad Company was afterwards approved and patent issued thereon. A suit was instituted for the purpose of having the Railroad Company declared a Trustee of the legal title for the timber and stone entryman upon the theory that prior to the time when the Interior Department approved the selection of the railroad, the land was open and subject to entry by any qualified entryman. This view of the law was adopted by the Circuit Court of Appeals for the Eighth Circuit wherein it held that no equitable right was acquired under and by virtue of an indemnity selection until its approval by the Secretary of the Interior. The decision of the Circuit Court of Appeals is reported in 161 Fed. 324, and is the same decision referred to in the final adjudication of the Secretary of the Interior in the case at bar set forth on pages 20 to 33 inclusive of appellant's Transcript of Record, and is found in the same portion of the Secretary's opinion cited above, wherein he held that it was within the competency of the officers of the Land Department to allow other entries, regardless of the rights or equities of Daniels acquired under and by virtue of his lieu selection.

The Supreme Court of the United States in reversing the Circuit Court of Appeals, determined as follows:

“It is beyond dispute on the face of the granting act of July 2, 1864, C. 217, 13 Stat. at L. 365, 367, and of the joint resolution of May 31, 1870, C. 67, 16 Stat. at L. 578, extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. It is also beyond dispute that, as the only method provided by the granting act for executing the grant in this respect was a selection of the lieu lands by the railroad company, subject to the approval of the Secretary of the Interior, that a construction which would deprive the railroad company of its substantial right to select and would render nugatory the exertion of the power of the Secretary of the Interior to approve lawful selections when made, would destroy the right which it was the purpose of Congress to confer. That the effect of holding that lands lawfully embraced in a list of selections duly filed and awaiting the approval of the Secretary of the Interior could, in the interim, be appropriated at will by others would be destructive of the right of selection is not only theoretically apparent from the mere statement of the proposition, but has, moreover, in actual experience been found to be the practical result of carrying that doctrine into effect. See 25 Opin. Atty. Gen. 632. Considering the language of the granting act from a narrower point of view, a like conclusion is in reason rendered necessary. The right to select within indemnity limits was conferred to replace lands granted in place which were lost to the railroad company because removed from the operation of the grant of lands in place by reason of the existence of the rights of others originating before the definite location of the road. The right to select within indemnity limits excluded lands to which rights of others had attached before the selection, and hence simply required that the selection, when made, should not include lands which at that time were

subject to the rights of others. The requirement of approval by the secretary consequently imposed on that official the duty of determining whether selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending action of the secretary. The scope of the power to approve lists of selections, conferred on the secretary, was clearly pointed out in *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 511, 33 L. Ed. 687, 694, 10 Sup. Ct. Rep. 341, where it was said that the power to approve was judicial in its nature. Possessing that attribute, the authority therefore involved not only the power, but implied the duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections. This view, while it demonstrates the unsoundness of the interpretation of the granting act which the contrary proposition involves, serves also at once to establish that the obvious purpose of Congress in imposing the duty of selecting and submitting the selections when made to the final action of the Secretary of the Interior was to bring into play the elementary principle of relation, repeatedly sanctioned by this court and uniformly applied by the land department from the beginning up to this time, under similar circumstances, in the practical execution of the land laws of the United States. Without attempting to cite the many cases in this court illustrating and applying the doctrine, a few only which are aptly pertinent and here decisive are referred to. *Gibson v. Chouteau*, 13 Wall. 92, 100, 20 L. Ed. 534, 536; *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424; *St. Paul & S. C. R. Co. v. Wirona & St. P. R. Co.*, 112 U. S. 720, 733, 28 L. Ed. 872, 877, 5 Sup. Ct. Rep. 334; *Oregon & C. R. Co. v. United States*, 189 U. S. 103, 112, 47 L. Ed. 726, 730, 23 Sup. Ct. Rep. 615; *United States v. Detroit Lumber Co.*, 200 U.

S. 321, 334, 50 L. Ed. 499, 504, 26 Sup. Ct. Rep. 282, and cases cited.

"In *Shepley v. Cowan* there was conflict between a pre-emption claim and a selection on behalf of the State of Missouri under an act of Congress conveying to the state a large quantity of land to be selected by the governor, the act providing that if the selection should be approved by the Secretary of the Interior, patents were to issue. The court said (p. 337):

"The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office; and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office."

"On page 338, after distinguishing *Frishie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668, and *Yosemite Valley Case* (*Hutchings v. Low*), 15 Wall. 77, 21 L. Ed. 82, the court said:

"But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

In *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 28 L. Ed. 872, 5 Sup. Ct. Rep. 334, one of

the questions arising for decision was which of two railroad companies was entitled to certain tracts of lieu lands situated within overlapping indemnity limits of certain grants made by an act of Congress to the territory of Minnesota to aid in the construction of the roads of the contesting companies. The selections were to be made by the governor, and required the approval of the Secretary of the Interior. The Winona Company filed a list of selections. The St. Paul Company made no selections, but nevertheless, on grounds which need not be stated, the Secretary of the Interior certified the lands to the state for the use of that company. The Winona Company brought suit in the state court to have a declaration of its rights in the land and to restrain the St. Paul Company and others from receiving a patent or other evidence of title to the lands from the governor of the state. The state court decreed in favor of the Winona Company, and this court affirmed its action. In the course of the opinion it was said (page 731):

“The time when the right to lands becomes vested, which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant or of lands which, for other reasons, are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limits by the location of the line of the road.’

“After referring to prior decisions the conclusion was reached that, as to the lands to be selected, ‘priority of selection secures priority of right;’ and that as the Winona Company alone had made selection of the lands, and that selection was lawful, the right to the land as against third parties vested in the Winona Company as of the date of the filing of its lists of selections. In concluding the opinion it was said (page 733):

“‘It is no answer to this to say that the Secretary of the Interior certified these lands to the state for the use

of the appellant. It is manifest that he did so under a mistake of the law, namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for lieu lands or for the extended grant of 1864, out of any odd sections within 20 miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the law, and this erroneous decision of his cannot deprive the Winona Company of rights which became vested by its selection of those lands. *Johnson v. Towsley*, 13 Wall. 72, 80, 20 L. Ed. 485, 486; *Gilson v. Chouteau*, 13 Wall. 92, 102, 20 L. Ed. 534, 537; *Shepley v. Cowan*, 91 U. S. 330, 340, 23 L. Ed. 424, 427; *Moore v. Robbins*, 96 U. S. 530, 536, 24 L. Ed. 848, 851.' So, also, in *Oregon & C. R. Co. v. United States*, 189 U. S. 103, 47 L. Ed. 726, 23 Sup. Ct. Rep. 615, the court said (page 112):

“Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd numbered sections within its place or granted limit—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class the company acquires no interest in any specific sections until a selection is made with the approval of the land department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make.’

“The doctrine thus affirmatively established by this court, as we have said, has been the rule applied by the land department in the practical execution of land grants from the beginning. *Porter v. Landrum*, 31 Land Dec. 352; *Re Southern P. R. Co.*, 32 Land Dec. 51; *Re Santa Fe P. R. Co.*, 33 Land Dec. 161; *Eaton v. Northern P. R. Co.*, 33 Land Dec. 426; *Santa Fe P. R. Co. v. Northern P. R. Co.*, 37 Land Dec. 669. The well settled rule

of the land department on the subject was thus stated by the then assistant attorney general in the department, now Mr. Justice Van Devanter, as follows:

“Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings; and while, until approved and patented, they would remain subject to examination, and to rejection or cancellation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.

“There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.

“What effect has been given to a pending railroad indemnity selection?

“Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal; but on August 15, that year, these withdrawals were revoked and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. *Dinwiddie v. Florida R. & Nav. Co.*, 9 Land Dec. 74. In the circular of September 6, 1887 (6 Land Dec. 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. In fact a railroad

indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws.' (32 Land Dec. 53.)

"Despite the doctrine of this court, as expounded in the cases previously referred to, the unbroken practice of the land department from the beginning in the execution of land grants, impliedly sanctioned by Congress during the many years that administrative construction has prevailed, and the destructive effect upon rights conferred by land grant acts which would result from applying the contrary view, it is yet urged that this must be done because of decisions of this court which it is insisted constrain to that conclusion. One of the decisions thus referred to is *Sjoli v. Dreschel*, 199 U. S. 564, to which we have previously referred, and others are cited in the margin.

"What we have already said as to the *Sjoli* case would suffice to dispose of the suggestion concerning that case, but we shall recur to it. As to the other cases, it would be adequate to say that not one of them involved the question here under consideration, nor even by way of obiter was an opinion expressed on such question. Indeed, all the cases relied upon may be placed in one of three classes: (a) those involving the nature and character of the right, if any, to indemnity lands prior to selection; (b) whether such lands, after the filing of a list of selections and before action by the Secretary of the Interior thereon, could be taxed by a state to the railroad company as the owner thereof; and (c) those which were concerned with the nature and character of acts which were adequate to initiate a right to public land which would be paramount to a list of selections when the acts were done before the filing of the list of selections. In none of the cases, moreover, was

the well settled doctrine of this court as to relation, even by remote implication, questioned. Indeed, in most of the cases relied upon the previous decisions to which we have referred, expounding the doctrine of relation, were approvingly cited or expressly reaffirmed.

“The *Sjoli* case, from the facts we have already stated, is clearly here inapplicable, because it falls in the third of the above classes. If it be conceded that general language was used in the opinion in that case which, when separated from its context and disassociated from the issues which the case involves, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in *Cohen v. Virginia*, 6 Wheat. 399, 5 L. Ed. 290, so often since reiterated and expounded by this court, to the effect that ‘general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.’ The wisdom of the rule finds apt illustration here when it is considered that not even an intimation was conveyed in the *Sjoli* case of any intention to overrule the repeated prior decisions of this court concerning the operation and effect of the doctrine of relation upon the approval by the Secretary of the Interior of a lawful list of selections. That the general expressions in the *Sjoli* case are not persuasive here clearly results from the demonstration which we have previously made, that to apply them would be in effect to destroy the indemnity provisions of the granting act. Moreover, that serious general injurious consequences would arise from treating the expressions relied upon in the *Sjoli* case as persuasive is clear (a) because to do so would result in the overthrow of the uniform rule by which the land department has administered land grants from the beginning—a rule continued in force

after the decision in the Sjoli case because of the administrative conclusion that that case should be confined to a like state of facts and not be extended to other and different conditions (25 Ops. Atty. Gen. 632); (b) because of the destructive effect upon rights of property and the infinite confusion which would now arise from extending, under the circumstances stated, the observations in the Sjoli case to the wholly different state of facts presented upon this record."

Weyerhaeuser v. Hoyt, 219 U. S. 380, 387; 55 L. Ed. 258, 261-264.

The opinion just quoted proceeds upon the theory that it appears from the face of the granting act and joint resolution therein referred to, that Congress intended to confer upon the lieu selector a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. That portion of said Act which relates to the right of selection provides as follows:

"And whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior."

13 Stat. at L. 365, 367, 368.

The language of the Act which is now before this court for construction in the present case provides in part as follows:

"That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within

the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government and may select in lieu thereof a tract of vacant land open to settlement."

30 Stat. at L., 36, Chap. 2, U. S. Comp. Stat. 1901, p. 1541.

The only essential difference between these two provisions is that in the case of a railroad selection the statute requires the approval of the Secretary. This brings all suits arising under and in accordance with the provisions of the forest lieu selection act within direct range of the doctrine announced and the principles laid down in the case of *Weyerhaeuser v. Hoyt*, 219, U. S. 380, above cited. This very contention was supported by the Interior Department itself in the recent case of *Santa Fe Pacific Railroad Co.*, 41 L. D. 96, 98. In said case the First Assistant Secretary held as follows:

"The state relies largely upon the language found in the case of *Sjoli v. Dreschel* (199 U. S. 564), but without giving extended consideration thereto it is sufficient to say that said decision was explained and distinguished in the more recent case of *Weyerhaeuser v. Hoyt* (219 U. S. 380), and from the latter decision it may be fairly deduced that a selection requiring departmental approval is from the date of its filing an appropriation of the land selected, and that when approval is given its relation is of the time of its filing."

Santa Fe Pacific Railroad Co., 41 L. D. 96, 98
(June, 1912).

Even, therefore, if the court should read into the statute of June 4, 1897, the requisite of departmental approval as a condition to the vesting of any interest, nevertheless under the decision last cited, the land selected is segregated from the public domain and is therefore not open to entry pending such approval or disapproval, and it is admitted in the case at bar that the entry of the appellee was made long before the final decision of the Interior Department arbitrarily overruling its prior holdings and revoking Daniels' rights, and long after the making of Daniels' lieu selection.

As above stated, the case of *Weyerhaeuser v. Hoyt* proceeds upon the theory that Congress intended to confer upon the Railroad Company a substantial right to select land within the indemnity limits in lieu of lands lost within the place limits. Does the Act of June 4, 1897, which Act is presented for consideration at this time, purport to confer such a substantial right? To hold otherwise would be to render the statute itself meaningless, and would in the language of Chief Justice White in the *Weyerhaeuser* case above cited not only "destroy the right which it was the purpose of Congress to confer," but would also "be destructive of the right of selection."

In order to combat the clear, lucid and elementary principles laid down in the case of *Weyerhaeuser v. Hoyt* above cited, and to avoid, if possible, the application of those principles to the

case at bar, it was argued upon the hearing and maintained by the court that the objects, purposes and results contemplated by the Act of June 4, 1897, were entirely different from the objects, purposes and results contemplated by the granting act and joint resolution presented for consideration in the case of *Weyerhaeuser v. Hoyt*. It was contended and held that the act involved in the latter case amounted to a grant and that the right of selection therein given was in exchange for a vested right of which the railroad had been deprived, while on the other hand the Act of June 4, 1897, was a mere standing offer upon the part of the Government to give to the owner of lands included within the limits of a forest reservation the right to select other land in lieu thereof, the selector not being deprived, however, of any vested right for the reason that he was under no obligation to select land elsewhere and could continue if he so desired to possess his holdings within the forest reservation; and that since the right of selection was in the nature of a contract offer, the Government could accept or reject the offer at its will.

The fallacy of this theory as formulated is shown by its mere enunciation.

In the first place, the distinction which the theory attempts to support is negatived by the very holdings made in the case of *Weyerhaeuser v. Hoyt*. In that case Justice White, referring to the earlier decision of *Oregon & California Railroad Co.*

v. United States, 189 U. S. 103, 112; 47 L. Ed. 726, 731, for the purpose of determining the inherent character of a selection made under the Act there presented for consideration, adopted the following quotation:

“Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd numbered sections within its place or granted limits, which interest relates back to the date of the granting act, the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the land department, and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make.”

Weyerhaeuser v. Hoyt, 219 U. S. 380, 391; 55 L. Ed. 258, 263.

It is apparent from the language last quoted, that the right of selection conferred upon the Railroad Company was not only not a grant, but that it did not rise even to the dignity of a contractual relation, which according to the contention of the solicitors for the appellee and of the trial court, was conferred by the Act of Congress of June 4, 1897, giving to the owner of lands within a forest reservation the contract right to select any other public land in lieu thereof. The language above quoted holds expressly that up until the date of selection the Railroad Company acquired no interest

whatsoever in the selected land, and so free was such land from any individual interest whatsoever, that prior to a selection the Government could make any disposition of the land which it might see fit. Furthermore, the very language quoted points this out as a basic distinction between lands within indemnity limits and lands within place limits. How, then, can it be logically argued for a single moment that under the acts presented for consideration in the case of *Weyerhaeuser v. Hoyt*, the Railroad Company acquired any higher or better rights of selection than the owner of forest reservation land acquires under the Act of June 4, 1897!

Indeed, it is very apparent that Congress has bestowed upon the owner of land within a forest reservation a greater right to the lieu land than was conferred upon the Railroad Company by the act construed in the case of *Weyerhaeuser v. Hoyt* above cited, because the very contention which the solicitor for the appellee urged in attempting to distinguish the case of *Weyerhaeuser v. Hoyt* from the present case, admits that from the date of selection a contractual relation is established between such an owner of land within a forest reservation and the United States Government.

Furthermore, the Railroad Company acquired absolutely no interest in lands granted, which had been otherwise reserved, sold or granted prior to the railroad grant, for the reason that these prior sales made it impossible for any title to said por-

tions of the land to vest in the Railroad Company. It therefore follows that the Railroad Company had been deprived of no vested right, while on the contrary the owner of land within a forest reservation had at least been constructively deprived of a vested interest, by virtue of the act which enclosed his land within the limits of a forest reservation.

In the second place, if the contention urged by the appellee and sustained by the court, to the effect that the statute of June 4, 1897, constitutes a standing offer on the part of the Government to give land in exchange for land embraced within a reservation, then it follows that whenever this offer is accepted by virtue of a selection there is immediately created a vested right, of which the selector can not be deprived unless perchance he has failed to conform to some one of the conditions precedent which must accompany his acceptance of the outstanding offer. This latter proposition is supported by a decision of the Supreme Court of the United States in the case of *Roughton v. Knight*, 219 U. S. 537. Justice Lurton quoting from the Secretary of the Interior, used the following language in the case last referred to:

“No contract arises until a selection is made and the conveyance of the base tract filed in the land department. Under the Act of June 4, 1897, it is the filing of the deed in the local land office and the selection of land in lieu of that relinquished which initiates the ex-

change. Until that time the exchange is not initiated and is merely a purpose in the private owner's mind."

Roughton v. Knight, 219 U. S. 537, 548; 55 L. Ed. 326, 328.

If, therefore, it be held that the Act of June, 4, 1897, does not in itself constitute a grant of lands without a reservation in lieu of lands included therein, but is on the contrary an open standing offer on the part of the Government constituting a contractual relation, then the moment this offer is accepted a right is initiated, the offer and acceptance are complete, and it only remains for the officer upon whom the duty devolves, to determine whether or not the selection is in all respects regular. It is admitted in the case at bar that a deed to the land within the forest reservation was made and executed. It is further admitted that an abstract of title showing the grantor to be the owner in fee simple of the land so deeded was presented, together with the deed. It is further admitted that a forest lieu selection of the lands in controversy in this case was made. It is further admitted from the face of the amended pleading as is shown by the decision of the Secretary of the Interior, as well as by the three respective acts of approval of these selections by the Land Department, that the selection was in all respects regular. In face of these admitted facts, how can it be argued that the individual who is first in right in all particulars can

be deprived of that right! As was said by the Secretary of the interior himself:

“It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the secretary had been carried out it would have been done before the case became complicated by the counter equitable considerations arising upon the unfortunate allowance of the homestead and timber and stone entries for most of these lands.”

Appellant's Transcript of Record, page 32.

Daniels did all that he could do. He accepted the offer presented by the statute. He conformed to the requirements of the Secretary of the Interior. He did all that he was able to do, but because of the “**unfortunate**” action of the governmental officers he is to be deprived of all his rights. Fortunately, however, this is contrary to the well established principles of law long ago announced by the highest tribunal in the land:

“It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him.”

Lytle v. The State of Arkansas, 9 How. 314, 332.

In the third place, the intention of Congress as evidenced by an amendment to the Act of June 4, 1897, as well as the reasons which led to the passage

of the Act clearly establish that it was the intention of Congress to confer upon the owner of land embraced within a forest reservation, a substantial right to select other unoccupied public land in lieu of the land so included. This makes the present case one wherein each and every principle announced in the case of *Weyerhaeuser v. Hoyt* above cited should be applied. If these principles are so applied then it will have to be admitted that every question in the case at bar has already been determined by the court of last resort.

The Act of June 4, 1897, was amended in 1900, which amendment provides that the selections contemplated by the Act:

“Shall be confined to vacant, surveyed, non-mineral public lands which are subject to homestead entry not exceeding in area the tract covered by such claim or patent; provided, that nothing herein contained shall be construed to affect the rights of those who, previous to October 1, 1900, shall have delivered to the United States deeds for lands within forest reservations and made application for specific tracts of lands in lieu thereof.”

31 Stat. at L. 614.

The proviso just cited states in language which possesses no semblance of ambiguity, that the execution of the deed and the making of a selection creates a substantial right. To hold otherwise, would be to render the provision meaningless.

Again, the Act of Congress which repealed the

Act of June 4, 1897, contained the following proviso:

“Provided, that selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issued therefor the same as though this act had not been passed; and if for any reason not the fault of the party making the same any pending selection is held invalid, another selection for a like quantity of land may be made in lieu thereof.”

33 Stat. at L. 1264, Chap. 1495; U. S. Comp. Stats. Supp., 1909, p. 581.

This proviso merely confirms the intention of Congress to confer a substantial right and needs no comment.

If no such proviso existed, however, and we were left entirely dependent upon the Act of June 4, 1897, itself, it is clearly apparent from the face of the Act that Congress intended to confer upon the owners of land included within a forest reservation a substantial right to select other unoccupied public land in lieu thereof. The reasons for the passage of this forest lieu selection act were very clearly elucidated and expounded by Mr. Justice Lurton in the recent case of *Roughton v. Knight*, 219 U. S. 537.

In this connection we direct the court's attention to the following language of the learned Justice:

“Upon its face the act is neither more nor less than a proposal by the government for an exchange of claims

to land unperfected, or lands held under patents, situated within the exterior lines of a forest reservation, for an equal area of public land subject to entry elsewhere. The reasons for the provision are found in the disadvantages which result to such a settler or owner who had acquired his lands before the creation of a reservation in the public lands surrounding him. He was thereby isolated from neighborhood association and deprived of the advantage of schools, churches and of increasing value to his own land from occupation by others of the lands thus devoted to reservation purposes."

Roughton v. Knight, 219 U. S. 537, 546; 55 L. Ed. 326, 327.

As already stated, it was argued at the hearing of the demurrer to appellant's amended bill of complaint that the owner of land within a forest reservation was under no obligation to accept the offer covered by the Act of June 4, 1897, and could continue, if he so desired, to remain in ownership and possession of his land regardless of its inclusion within a forest reservation. Carrying this argument to its ultimate conclusion, it was contended that the holder of such reservation land was not therefore deprived of any vested right, and that the action of the Secretary of the Interior, with reference to the acceptance or rejection of an application for lieu land was an arbitrary power vested in him by law to be exercised at will; and he could bestow upon the lieu selector, if he so desired the gratuity which the Government offered by virtue of the Act of June 4, 1897. Whether Congress by virtue of the

Act of June 4, 1897, proposed to bestow upon the owner of lands within a forest reservation a mere gift or gratuity or whether it intended to confer upon him a substantial right of some kind is the vital question in this case.

If a gratuity was contemplated, however, then the Act of June 4, 1897, is a useless statute. It is merely an incumbrance upon our books. For if a gratuity was contemplated and the Secretary of the Interior was vested with the role of a Santa Claus to present this gratuity or withhold it at his will, the Government would merely have had to proceed with the creation of forest reservations and bestow the right of selection on those only who invited and invoked its sympathy. If the Government intended to relieve those only, whom the Secretary should designate, then it need not have passed the Act of June 4, 1897.

To argue that an individual who is deprived of a proper and adequate use of his land, but still possesses the land, has thereby lost nothing, is to argue that since matter is indestructible, the man whose house has been destroyed by fire has lost nothing, because he still possesses all of its original elements in the form of ashes.

The very fact that Congress passed and put into effect the Act of June 4, 1897, establishes beyond any possible doubt its own recognition of the deprivation which would result to an owner of land within a forest reservation, and its intention to

grant him in lieu thereof not a vague, mythical, inchoate right to obtain land elsewhere, but a definite, fixed and substantial right to select any other land which might be open to entry. Congress, of course, realized the isolation which would result from the barrier of a forest reservation. The deprivation of schools, churches, occupation and association by others and of all things which tend to give value to land, must inevitably follow the creation of such a barrier. It is a matter of common knowledge of which all courts will take judicial notice that many a tract of land within close range of a densely populated city, is valueless because of its inaccessibility. To deprive an individual of the value and use of his land is a greater deprivation than to deprive him of the land itself. In the latter instance he is deprived of the naked commodity, but no obligations flow from the deprivation, while in the first instance he still possesses the commodity, but has in addition thereto the constant expense of repair, keep and taxes.

It is therefore the contention of the appellant that the Act of June 4, 1897, conferred upon all owners of lands within forest reservations a substantial right to select in lieu of the land of which they were deprived any vacant, unoccupied land within the public domain, and that when, as in the case at bar, a selection of the lieu land has once been made, there is thereby initiated a right and interest of which the selector can not thereafter

be deprived save by his own failure to conform to the requirements of the statute from which this right emanated; that from the date of the initiation of this right the land over which the right has been exercised is thereby segregated from the public domain to the exclusion of all other interests pending the decision of the governmental officer in whom is vested the power of approval or rejection, if such approval is necessary; that when such power of approval or rejection is once invoked he is bound to determine not whether the lieu selector should be given a preference over a subsequent entryman, but whether the lieu selector has in all respects conformed to the law, for as stated by Mr. Justice White in the case of *Weyerhaeuser v. Hoyt*:

“The requirement of approval by the secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending the action of the secretary.”

Weyerhaeuser v. Hoyt, 219 U. S. 380, 388;
55 L. Ed. 258, 261.

The language last quoted is directly in conflict with the following language of the Secretary upon which the appellee's entire title is based:

“It is believed that these applications might have been allowed not as a matter of right but in the discretion of the Secretary of the Interior, and if the instructions of the secretary had been carried out it would have been done.” * * *

Appellant's Transcript of Record, page 59.

Furthermore, the Secretary's final holding in this particular was not only in direct conflict with the holding of the Supreme Court as just cited, but in direct conflict with his own prior holdings and rulings in approving the selections in question upon two different occasions.

The question to be determined in this case presents not only a far reaching proposition involving thousands of acres of the public land, but presents in addition a Federal question, such as to warrant an appeal to the Supreme Court of the United States. As above stated, the determination of the rights here involved depend upon whether or not the Act of June 4, 1897, confers a substantial right. A construction of this Act, which would support the contention of the appellant that the statute does confer a substantial right to select lands in lieu of lands lost within a forest reservation, would sustain the right of the appellant to maintain the present suit, and on the other hand a construction of the same Act to the effect, as maintained by the Secretary of the Interior, that under it the allowance of a selection is within his discretion, would defeat the present suit. Under such circumstances it is held that a Federal question is presented:

"If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. *Doolan v. Carr*,

125 U. S. 618 (31 L. Ed. 844); *Cooke v. Avery*, 147 U. S. 375 (37 L. Ed. 209)."

Northern Pacific Railroad Company v. Soderberg, 188 U. S. 526, 528; 47 L. Ed. 575, 581.

The few cases in which this question is now presented to this court for determination, constitute but a very small part of the instances wherein the same difficulty has arisen throughout the entire United States. The injury which the appellant in this case has suffered is undoubtedly very small in comparison to the injuries which have been suffered by many poor people whose entries have been embraced within forest reservations. The trial court in the case at bar in his endeavor to distinguish the doctrine laid down in the case of *Lytle v. State of Arkansas* above cited, to the effect that whenever an individual in the prosecution of a right has conformed to all the requirements of the law, he should not be deprived of his rights by virtue of the erroneous action of any governmental officer, argued that this doctrine applied only in cases of homestead and pre-emption entries, upon the theory that the government had always been tender as regards the rights of such entrymen. (Transcript of Record, page 21, in *Case of Daniels v. Wagner*, No. 2217.)

Such argument limits itself to the narrow confines of the present cases. The effect of the ruling to be here announced and the construction to be adopted cannot be limited to this appellant. Simply because there is nothing in the present case to

show that this appellant made a homestead entry on the base lands involved in this case does not go to prove for a single moment that many homestead entries have not been made upon lands which are now embraced within forest reservations. Furthermore, there is nothing in the present case to show that the forest reservation land here involved was not originally taken up as a homestead entry. It therefore logically follows that in the determination of the question here involved it is, theoretically at least, homesteader against homesteader, and such being the case how can it be logically argued or legitimately held that the rule which protects the homesteader in one instance, where he has been deprived of rights which he has legitimately earned by conforming to the law, should not be applied in other instances where he has lost a vested right?

It is indeed a sad spectacle to travel through a forest reservation and see a few isolated homesteaders who have made their entries in hopes of future increases in value by virtue of neighborhood associations, now entirely cut off not only from associations contemplated but from all associations. To allow the rule of law which has been adopted in this case to remain in effect is to hold that many of these unfortunate entrymen, whose rights have been thus jeopardized and whose future has been blighted, can only obtain relief as the arbitrary will of the Interior Department may direct, regardless

of the act of Congress in passing a statute for their protection.

In fact, to confirm the decree in the present case is to hold that the owner of land within a forest reservation who has deeded his interest back to the United States under and in accordance with the provisions of the act of June 4, 1897, can, if the Secretary of the Interior so desires, be prevented from ever selecting any other public land in lieu of that which he has deeded to the government. He might attempt to make a selection today which the secretary could deny tomorrow, and so on without end. The opportunity which this would open for the juggling of such rights is a fact which becomes apparent by merely attempting to put into practice the doctrine which the decree of the lower court establishes. It may be that such a case is an isolated and extreme one, but by such extreme cases the practical effect of a ruling may be oftentimes best tested.

It may be contended that these observations are not applicable to the case at bar, but courts whose decisions are of such far-reaching effect as are the holdings of this court, must take such matters into consideration in adopting and laying down a rule of property which is to affect so many individuals, as will be affected by the decision which is to be rendered herein.

In view of these considerations and in view of the further consideration that the question here pre-

sented is clearly a federal question, we respectfully urge that these questions and propositions of law be certified by this court to the Supreme Court of the United States as provided by section 239 of the Act of March 3, 1911, 36 Stat. at L. 1157.

Respectfully submitted,

PLATT & PLATT,

Solicitors for Appellant.

**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

ALVINA S. MERRITHEW,

Appellee.

BRIEF OF APPELLEE.

**Upon Appeal From the United States District
Court for the District of Oregon.**

NARRATIVE STATEMENT OF THE CASE

In the transcript of the record will be found a copy of the decision of the Secretary of the Interior upon the appeal of Archie Johnston et al., to that officer from the decision of the Commissioner of the General Land Office in favor of Daniels, the appellant here. In the decision the Secretary set out a considerable portion of the facts shown

by the record in the Department, and by the evidence which was adduced in the hearing had before the local land office. From that decision, and from the transcript, it will be seen that the original segregation of the lands in controversy by the State of Oregon was not only made by the filing of invalid lieu selections, but was induced by fraud. It sufficiently appears that in the fall of 1901 the appellant entered into an arrangement with one McHale whereby McHale, as agent for appellant, went to the vicinity of the lands and sought to find an advantageous bargain in which to invest moneys belonging to appellant. (Transcript p. 28.) It further appeared that this agent arrived in the immediate vicinity of the lands while the title thereto was still in the government; that while the agent was negotiating for the lands other persons with whom he was negotiating, prepared fraudulent applications to purchase the lands from the State of Oregon, in the name of fictitious persons, and prepared forged affidavits to the effect that the applications to purchase were made for the use and benefit of the supposed purchasers, and that no contracts had been made for the sale thereof, as required by the law of the State of Oregon governing the sale of State lands;

that these applications were forwarded to the State Land Board of the State of Oregon with one check covering the first installment payment to the State for the purchase of the lands, and directions were given to forward the certificates of sale to the bank in Klamath Falls, in which town McHale was then sojourning; that the State Land Board thereupon prepared and filed State lieu lists selecting the lands for the benefit of the fictitious applicants to purchase; that fraudulent assignments of these applications to purchase were prepared and filed in the office of the State Land Board, whereby it was pretended that the fictitious applicants assigned the lands to Daniels. While the department did not find that Daniels knew of this fraud, it did find that the purchasers were fictitious, and the assignments necessarily fraudulent. (Transcript p. 27.) No express finding was made as to whether McHale knew of the fraud, but the Secretary based his finding as to Daniels' knowledge upon the theory that even if McHale did have knowledge of the fraud, that knowledge would not be imputed to Daniels, although McHale was "his agent under powers which amounted to co-partnership." (p. 28.)

During the pendency of these fraudulent lists,

and between January, 1902 and February 8, 1904, various applications to enter the lands under the timber and stone and homestead laws were made. (Transcript p. 31.)

The State lieu lists were found to be invalid on account of lack of sufficient base, and Daniels set about to secure a preference right to select the same lands with other scrip. He first contested the lieu lists upon which he had theretofore based his rights. (Transcript p. 29.) Then he and others directed influence to be brought to bear on the Secretary of the Interior in the hope of getting a rule allowing them a preference right as "innocent purchasers without notice" of the fraudulent State certificates of sale. (Trans. p. 29.) The Secretary denied this application, and thereupon Daniels procured relinquishments from the State and procured new scrip. The Secretary concluded from the facts that Daniels' new scrip, being the lieu selections involved on this appeal, were filed in the local land office simultaneously with the State relinquishments, but the facts expressly found by the Secretary do not support the conclusion, for the record of the local land office imputes verity, and ought not to be permitted as a

matter of law, to be impeached collaterally, and that record shows that the lieu lists now in question were filed on February 8, 1904, and that the relinquishments were not filed until February 10, 1904, and no fact was either shown by the evidence or recited by the Secretary sufficient to impeach this record. (Trans. p. 30.)

The Register and Receiver had no right to act either on the relinquishments offered or on the lieu lists, under the regulations of the department, but they did attempt to reject the lists. Daniels appealed, and the department has rendered subsequent decisions pro and con upon the matter. The whole matter, however, was kept entirely within the jurisdiction of the land department, and no decision ever became final and operative in Daniels' favor, approving his lists and causing them to be entered of record, until the final decision of the Secretary, which is made "Exhibit A" of the bill of complaint in the Court below, and is set forth beginning with page 20 of the transcript on this appeal. That decision finally rejected so much of the lists in question as were involved in the timber and stone and homestead entries of the various appellees who are resisting this and like appeals.

It appears that shortly subsequent to the rejection of the lieu lists in question, some of the persons who had applied to enter the lands covered by those lists during the pendency of the State lieu lists, and others, applied to enter the lands under the provisions of the timber and stone and homestead laws, and they were allowed to enter, reside upon, cultivate, improve, make payment for and receive patents to the lands. Their equities in the lands are now far greater than any that Daniels could in any event claim, as the trade which Daniels proffered has simply been rejected, and he still has the lands he formerly held, and is out nothing by the transaction. The appellees, who are all poor men, have spent years in cultivating and improving the homesteads, and making comfortable homes of them, and have paid the purchase price of the timber and stone claims, and have paid large sums in taxes on them each year since they were patented.

POINTS AND AUTHORITIES.

I.

A court of equity will not decree that a patent issued to one applicant for public lands is held in trust for an unsuccessful applicant, unless the un-

successful applicant has acquired a vested interest in the lands. It is not enough that he has made an application to acquire a vested interest; all of the steps necessary to be taken to complete a vested interest, and an equitable estate in the lands must have been taken, not only by the applicant, but also by the officers of the land department.

Cosmos Exp. Co. v. Gray Eagle Oil Co., 104 Fed. 20.

Same case, 190 U. S. 303.

II.

A principal is bound to take notice of such facts as are within the knowledge of his agent, and therefore if McHale knew of the fraud originally practiced in the acquisition of the State certificates of sale, Daniels will be presumed to have also known of it.

1 Am. & Eng. Enc. of Law, 1144.

III.

Under the rules and regulations in force in the land department at the time the lieu selections in question were filed, or attempted to be filed, the Register and Receiver had no authority to act either upon the lieu selections or the relinquishments, but were required to forward them to the

General Land Office for action.

Secretary's decision cited and set forth in the Transcript of the Record at page 31.

IV.

A public record can not be impeached by parol evidence and therefore the conclusion of the Secretary that the State relinquishments and the lieu lists in question here were filed on the same date is an error of law, and for the purpose of this demurrer, the filing is to be considered as made when shown to have been entered of record.

Musser v. Hyde, 2 Watts. & S. (Pa.) 314.

Hatch v. Haskins, 17 Me. 391.

V.

A decision by an officer that is afterwards, within the time when the matter in question is still within the jurisdiction of such officer, revoked and set aside, has absolutely no effect. It is of no more effect than it would be if it had never been made.

Brandt v. Brandt, 67 Pac. 508.

VI.

The mere tendering of a list of selections to the local officers can not create a vested interest,

amounting to an equitable title, in the person tendering the list, to the lands described in the list.

Cosmos Exp. Co. v. Gray Eagle Oil Co., 104
Fed. 20.

Cosmos Exp. Co. v. Gray Eagle Oil Co. 190
U. S. 303.

VII.

The relinquishment of rights acquired under a lieu selection returns the lands involved in such selection to the government, and no man is entitled to insist upon immediate action upon it, or can be held to be agrieved if such immediate action is not taken.

ARGUMENT

The brief of appellant herein proceeds upon the theory that it appears from the record presented that Daniels' application to select the lands in controversy was in all respects regular, and the lands vacant when he applied to select them. This contention is not borne out by the record. His chief contention before the department was that inasmuch as he was an "innocent purchaser for value without notice of fraud" of the certificates of sale based on the State lieu selections which had formerly been made, he was entitled to have a rule

adopted specially for his benefit which would permit him to exercise a preference right of selection. As is set forth in the decision of the Secretary of the Interior which is attached to the bill, and is marked "Exhibit A" thereof, the regulations in force when Daniels sought to select these lands required that both the relinquishments and the selections should be forwarded for action by the department. The lands could not be held to be "vacant and unoccupied" until the relinquishments were accepted and the State School lists cancelled upon the records of the General Land Office, and the local office notified of that action and directed to cancel the lists upon their record.

The appellant here could be entitled to no consideration, unless he could show that the local office was obliged to cancel the State lists when he presented relinquishments of those lists, without forwarding the relinquishments to the General Land Office for consideration, as the regulations in force provided. Even if it were conceded that his lists and the relinquishments were presented simultaneously it could not be contended that the records were or could be clear until action was taken upon the relinquishments. The regulations

provided that the relinquishments should be forwarded to the General Land Office for consideration. Before the State School Lists, which effectually segregated the land in controversy from the public domain, could be canceled, and their cancellation noted of record, it required that the relinquishments submitted should be given consideration by the officer designated by the regulations, and that that officer should determine, from such consideration, that the relinquishments were in all respects regular, were executed by the proper official of the State, corresponded with the lieu lists filed, and had the legal effect of cancelling the State's lists. Before appellant can prevail here, he must go a step further than any case to which attention has been called, for he must show that he had an absolute equitable right to have the State's lists canceled as soon as he presented the relinquishments in question. There is no provision of law that entitles any person to have any entry or selection list relinquished to him, or for his benefit. Neither can he complain if the relinquishment is rejected, and the department refuses, however erroneously, to cancel the entry or list. The relinquishment releases the land to the government, and in contemplation of law the

land becomes subject to application to enter, not only by the person who brings in the relinquishment, but by any qualified entryman, whenever the relinquishment is accepted, acted upon, and the cancellation based upon it entered of record. But no man has any right to insist upon the cancellation.

It will be seen that even if Daniels' applications were presented simultaneously with the relinquishments, he has no standing in a court of equity to complain that the relinquishments were not acted upon so as to make his lists valid, or to give him a right of selection. Therefore, if it be assumed, from the Secretary's decision, that the relinquishments were received at the local land office at Lakeview on the 8th day of February, 1904, Daniels is in no position to complain of the rejection of his lists of selection on that day, for the officers were not either required or entitled to cancel the pending State School lists on that day, and the lands in question could not become vacant until the State School lists were canceled. The Secretary of the Interior concluded that the lists and the relinquishments were received on the same day; but he did not conclude that the records

were cleared of the pending State School lists by the cancellation of those lists on the day of the receipt of the lists involved in the present appeal of appellant. No matter when the relinquishments arrived at the land office, the record was not clear, and the land was not "vacant" within the meaning of the statute, and within the rulings of the courts and the department to the effect that land included within a pending list is segregated from the public domain, until the relinquishments were accepted and the lists canceled. Daniels certainly is not entitled to now be heard to say that he had an equitable interest in securing the cancellation of the State School lists, for the relinquishments he filed released the land to the government, and not to him.

The statement made in the Secretary's decision that the relinquishments and the lists offered by Daniels arrived at the local office on the same day, ought to be disregarded by the court, for it is founded on an erroneous impression of the law. It appears from the decision in question that the entry was made on the record to the effect that the relinquishments were not filed until February 10, 1904, two days after Daniels offered his lists of selection. This record imputes verity; persons exam-

ining the record were entitled to rely on it. Who can say that when the appellees in the cases of which this is one examined the record to determine whether the lands for which they applied were vacant, they did not note and rely upon the fact that when Daniels' lists, from the rejection of which he had then appealed, were filed the land was involved in the State School lists, relinquishments of which were not noted of record until two days later? And ought this record to be disputed years later by the suggestion, based on parol proof, that the relinquishments probably were received on the same day as the lists? And, regardless of whether the relinquishments arrived at the office on the same day as the lists, the relinquishments did not become operative for the purpose of clearing the record of the segregation produced by the State School lists until they were approved by the General Land Office, or at least until they were noted of record by the local officials.

The bill seems to proceed upon the theory, as Daniels contended in the Land Department, that Daniels was entitled to some extraordinary consideration by reason of the fact that he was an innocent purchaser of the original State certificates of sale, which were based on the State School Selec-

tions, relinquishments of which he produced. Inasmuch as this phase of the case is not insisted upon in the brief, no further attention will be given to it than to remark that the proof in the department was very convincing to the effect that Daniels, or at least his agent McHale, was an active party to the fraud connected with these certificates of sale, and that upon a trial of the issues that would be raised by an answer it is believed that it could be shown that Daniels' attempt to acquire these lands was so thoroughly tainted with fraud that it could not be said that he comes into this court with clean hands in the transaction. The facts in this connection do not fully appear from the record, but it does appear that there was fraud, and it is at least inferentially shown that McHale, Daniels' agent, was a party to the fraud, or cognizant of it.

Daniels' contention that there has been an approval of his applications to select is wholly without foundation. It is recited that upon several of the various appeals that were taken from time to time decisions were rendered in which the idea was expressed that if no further objection appeared, favorable action ought to be taken on his applications. These decisions were all, within the time

when the matter was within the jurisdiction of the department, and on appeals from the decisions, reversed and set aside. Aside from this, the decisions themselves proceeded upon the theory that while Daniels was not entitled of right to select the lands at the time he proffered his lists, inasmuch as the State lists which were pending when he did proffer them had been subsequently canceled, and the objections which existed when the lists were offered had been obviated, in the absence of adverse claims, the lists might be treated as having been offered over again, in the discretion of the Secretary. These decisions were rendered *ex parte*, and before they were put into effect, or became operative, it was shown that adverse rights had intervened, and that the intended discretionary action would work an injustice. The decisions so rendered were set aside, and they can not now be treated as having had any force or effect. Not only this, but the rights of the appellee attached to the land before the decisions which Daniels claims ought to operate as an approval of his lists were rendered.

It is asserted in the brief of appellant that the Secretary found that Daniels' lists were in all respects regular, and ought to have been allowed when tendered. An examination of the decision

of the Secretary does not support this assertion. The decision states that "it matters not if Daniels' application was in all respects regular and might have been allowed when presented." It does not assert that the application was regular, and the specific facts found to exist at the time of the presentation of the application show that it was not in all respects regular. The State lists were then pending, and so far as the writer of this brief has been able to determine there was no existing provision of law regarding the relinquishment of such State lists. It is true that Sec. 1 of the Act of Congress of May 14, 1880, ch. 89, (21 Stats. 140) provided that when a "pre-emption, homestead or timber culture claimant" should file a written relinquishment of his claim, the land should be thereupon considered open to entry. But no provision has been found for the relinquishment of a State School selection list. And, while it may be conceded that a practice in the department of cancelling such lists upon relinquishment would perhaps be a reasonable method of clearing the records of such lists, it certainly can not be contended that any one has any legal or equitable right to insist upon such cancellation, or can be said to be divested of a vested interest because such action is

not taken.

Aside from this, it appears that prior to the time Daniels applied to select these lands, various timber and stone and homestead claimants had applied to enter the lands, and their applications were under consideration.

But, as was said by Judge Bean in his decision upon the demurrer in this case, even if there were no question here of the fact that the records were clear when Daniels presented his lists of selection, he did not acquire, by the mere presentation of the lists, without final approval, any such vested interest as will now entitle him to the extraordinary relief of being declared the equitable owner of the land in controversy. The Commissioner of the General Land Office is given authority by Sec. 2450 R. S. to decide upon principles of equity and justice, as recognized in the courts, and in accordance with regulations to be prescribed by the Secretary of the Interior, the Attorney General and the Commissioner conjointly, cases of suspended entries, and the authority of general supervision over the disposal of the public lands is vested in the land department. The courts ought to be, and are, slow to interfere with the action of the de-

partment, and it is only when the right to acquire land has been perfectly clear, when the counter equitable considerations, if any, are clearly subordinate to the rights of the applicant, and when the department has fallen into clear error in the disposition of the lands, that courts of equity will interpose.

It is not the purpose of appellee in this brief to review the many decisions that have been rendered in cases where it has been attempted to hold patentees as trustees for rejected applicants. It is believed that the principles upon which the courts have acted are fully understood, and need not be elaborated here. We do not believe that it can be doubted that the case of *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, *supra*, cited by Judge Bean in his opinion on the case of the appellant here against Wagner (No. 2217), in which case the issues were identical with the issues here, is decisive of the law of this case. It was there held that no vested interest is acquired by the mere tendering of the selection to the local officers, even where the tendered papers are accepted and filed, and the appropriate certificates, showing the records to be then clear, are made. Here no such certificate

was ever made, and Daniels' appeal in the land department was from the refusal of the local officers to make such certificate, and to enter the lists upon their records, as of the 8th day of February, 1904, at which time, as has been shown, the lands in controversy were covered by the State School selection lists. It is asserted that the subsequent letters which were written by the various land officers constituted an approval of the lists. That this position is absolutely untenable can be seen by a careful reading of the Secretary's decision. It can be seen therefrom that the only question ever considered was as to whether the lists should be permitted to be filed in the first instance. There is absolutely no showing that the department has, or had at the time of the rendition of the decision in question, passed upon the abstracts of title submitted with the selections, approved the base, or even rendered any decision respecting it, or respecting the right of appellant, or anyone else, to select land in lieu of the base offered. It is clear that the department had not reached the consideration of that question, and had gone no further than to determine that Daniels was not entitled to file his lists of selection. There were opinions which directed the Register and Receiver

to take further action looking to the filing of the lists, which decisions were recalled. If such decisions had not been recalled, but had become final, as the action of the Department, then the Department would have considered the base offered, the abstracts tendered, the deeds to the United States, and all of the other questions necessary to the finding that Daniels was entitled to patent for the selected land. So far as appears, those questions have never been decided, as the Department has found insurmountable objections to the consideration of the questions before the questions were reached.

As we view the matter, there can be no question of Daniels' legal rights in the matter. He was seeking special consideration as an innocent purchaser, and has even set out in his bill a letter which he contended in the department gave him some right to such consideration. It appears from the record that the certificates of sale of which he claimed to be an innocent purchaser were actually assigned before they were issued, having been assigned on the 21st day of January, 1902, and not issued until the 28th day of that month, although the law specifically provided that no

sales of that character should be made except upon proof, in the form of sworn statements, that the purchaser took his individual half section for his own use and benefit, and without any contract for its disposition. As a matter of law, this ought to deprive him of any equitable consideration as an innocent purchaser, for the fact being of record, and being a part of his chain of title, he was bound to take notice of it. But he is now contending that inasmuch as the Secretary made the observation that he might have been entitled to the special consideration he was seeking, and might have been entitled to a preference right over other qualified applicants, in the discretion of the Secretary, this court ought to extend that special consideration to him.

We do not purpose to quote from the decision upon which the learned judge in the court below particularly based his decision, as this court is doubtless familiar with that decision. It appears therefrom, however, that the act in question has been treated by the Supreme Court as being simply an offer to effect a trade, and that the details of the acceptance of the trade by the government are not worked out by the act itself, but are im-

pliedly left to the Secretary of the Interior; and that decision holds that a mere offer of the exchange contemplated by the statute gives the applicant no vested interest, or equitable estate, in the lands. We find nothing contrary to this view in the case of *Weyerhauser v. Hoyt*, cited by appellant. In that case it was necessary, in order to establish the timber and stone claimant's contention, to over-turn the Secretary's ruling, and to compel that official, in the orderly discharge of his duties with respect to the public lands, to hold the lands covered by an application to select under the particular words of the granting act there in question (which differ from the words of the act in question here), open to entry at all times until the selection lists were finally approved by the Secretary. We make no such contention here, but do contend that Daniels has not brought himself within the rule in that case. In that case there was a final approval by the Secretary; the applications were ultimately "clear listed," the proffered base approved, and patent issued to the applicant. Here there has not been any clear listing, any approval or any patent, but on the other hand the department has expressly refused to clear list the applications to select, or even to

consider the base offered, or the regularity of the lists themselves. It has merely considered whether there are other existing claims to the lands which will interfere with the taking of that action, and has held that there are, and has issued patents accordingly.

The action of the department was not arbitrary or unreasonable. It was the only action that could be taken in the existing state of the record. Daniels had sought, by importuning the Secretary of the Interior, and at last by bringing relinquishments, for which there was no express provision of law, and which the rules of the department required should be forwarded to the General Land Office for consideration, to gain a preference right over others who contended for the right to enter the lands, which were then segregated from the public domain by fraud, in which the predecessors in interest of Daniels', if not his own agents, had participated. The department refused to cancel the existing lists when he demanded they should be canceled, and refused to approve his applications to select the lands. He now demands that the prior lists be treated as having been cancelled before they were actually cancelled and

that his lists be treated as having been approved when they were not approved, and that he be decreed to have the equitable estate to the lands, in which appellees have large and persuasive equities, based upon long occupancy, and large payments. We do not believe that this claim can be sustained, and therefore submit that the action of the court below should be affirmed.

Respectfully submitted,

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